TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 490.

HARRY PLUMMER, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF JOSEPH PLUMMER, DECEASED, PLAINTIFF IN ERROR,

vs.

BIRD S. COLER, COMPTROLLER OF THE CITY OF NEW YORK.

IN ERROR TO THE SURROGATE'S COURT OF THE COUNTY OF NEW YORK, STATE OF NEW YORK.

FILED JANUARY 9, 1900.

(17,603.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 20, 1900.

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a In the Court of Appeals.

In the Matter of the Appraisal, under the Acts in Relation to Taxable Transfers of Property, of the Property of JOSEPH PLUMMER, Deceased.

Papers on Appeal.

Jabish Holmes, Jr., attorney for the Comptroller of the City of New York, respondent.

Evarts, Choate & Beaman, attorneys for appellant.

Endorsed: Filed Jan'y 8, 1900.

b Court of Appeals.

STATE OF NEW YORK, *ss.*:

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 8th day of January, in the year of our Lord one thousand nine hundred, before the judges of said court.

Witness the Hon. Alton B. Parker, chief judge, presiding.

W. H. SHANKLAND, *Clerk.*

Remittitur January 8th, 1900.

c In the Matter of the Appraisal, under the Acts in Relation to Taxable Transfers of Property, of the Property of JOSEPH PLUMMER, Deceased.

Be it remembered that on the 8th day of January, in the year of our Lord one thousand nine hundred, Harry Plummer, as executor, etc., the appellant in this action, came here into the court of appeals, by Evarts, Choate & Beaman, his attorneys, and filed in the said court a notice of appeal and return thereto from the order of the appellate division of the supreme court in and for the first judicial department, and Bird S. Coler, comptroller of the city of New York, the respondent in said action, afterward appeared in said court of appeals, by Jabish Holmes, Jr., his attorney; which said notice of appeal and the return thereto, filed as aforesaid, are hereunto annexed.

d Whereupon, the said court of appeals having heard this cause argued by Mr. William V. Rowe, of counsel for the appellant, and by Mr. Jabish Holmes, Jr., of counsel for the respondent, and after due deliberation had thereon did order and adjudge that the order of the appellate division of the supreme court appealed from herein be, and the same hereby is, affirmed with costs.

And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the surrogate's court in and for the county of New York, there to be proceeded upon according to law.

Therefore it is considered that the said order be affirmed, with costs, as aforesaid.

And hereupon, as well *as* the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals remitted into the surrogate's court in and for the county of New York, before the surrogates thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said surrogate's court before the surrogates thereof, &c.

W. H. SHANKLAND,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, *January 8th*, 1900.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[SEAL.] W. H. SHANKLAND, *Clerk.*

1 Surrogate's Court, County of New York.

In the Matter of the Appraisal, under the Act in Relation to Taxable Transfers of Property, of the Property of JOSEPH PLUMMER, Deceased.

Statement under Rule 41.

The petition of Harry Plummer, as executor of Joseph Plummer, deceased, was filed December 19, 1898. The order made thereon appointing an appraiser was filed December 20, 1898.

The names of the parties herein are Bird S. Coler, comptroller of the city of New York; Harry Plummer and Ella Plummer Brown.

All of the parties are of full age.

The comptroller was represented on the hearing before the appraiser.

The appraiser's report was filed June 3, 1899.

The order fixing the tax herein was filed July 19, 1899.

The notice of appeal to the surrogate was filed September 16, 1899.

The order confirming the order fixing the tax was filed December 22, 1899.

2 *Petition for Appraiser, Read on Behalf of Petitioner.*

Surrogate's Court, County of New York.

In the Matter of the Appraisal, under the Acts in Relation to Taxable Transfers of Property, of the Property of JOSEPH PLUMMER, Deceased.

To the Honorable John H. V. Arnold, surrogate:

The petition of Harry Plummer, as executor of the last will and testament of Joseph Plummer, deceased, respectfully shows:

First. That your petitioner is the executor of the last will and testament of Joseph Plummer, deceased, and as such is a person interested in the estate of the said decedent.

Second. That the said decedent departed this life on the twenty-fourth day of October, 1898, in the borough of Manhattan, in the city of New York, and that he was at the time of his death a resident of the State, city and county of New York.

Third. That the said decedent left a last will and testament whereby he appointed your petitioner the sole executor thereof, which will was on the twenty-third day of November, 1898, duly proved before and admitted to probate as a will of real and
3 personal property by the surrogate's court of the county of New York, to which jurisdiction in that behalf appertained, and that letters testamentary under said will were, on the same day, issued by said court to your petitioner, who is now the sole executor of said will.

Fourth. That as your petitioner is informed and believes, the property of said decedent passing by said will, or some portion thereof, or some interest therein, is subject to the payment of the tax imposed by the law in relation to taxable transfers of property.

Fifth. That all of the persons who are interested in the estate of said decedent and who are entitled to notice of all proceedings herein, including your petitioner and the comptroller of the city of New York, and their post-office addresses, are as follows, viz:

Bird S. Coler, comptroller of the city of New York, whose post-office address is number 280 Broadway, borough of Manhattan, New York city.

Harry Plummer, your petitioner, a son of said deceased testator, and a devisee and legatee and the executor named in said will, whose post-office address is No. 23 Gramercy park, borough of Manhattan, New York city.

Ella Plummer Brown, a daughter of said deceased testator, and the beneficiary of a trust created for her benefit under and by virtue of said will, whose post-office address is No. 225 West Twenty-third street, borough of Manhattan, city of New York.

Wherefore, your petitioner prays that you will appoint some competent person as appraiser, as provided by law.

And your petitioner will ever pray, &c.

HARRY PLUMMER, *Executor.*

——— ———,
Attorneys for Petitioner.

4 STATE OF NEW YORK, }
County of New York, } ss.:

Harry Plummer, being duly sworn, deposes and says, that he is the petitioner in the foregoing petition named; that he has read the said petition and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

HARRY PLUMMER.

Sworn to before me this 19th day of December, 1898.
WM. R. MONTGOMERY,
Notary Public, New York County.

Original filed December 19, 1898.

Order Appointing Appraiser.

At a surrogate's court of the county of New York, held at the county court-house, in the borough of Manhattan, in the city of New York, on the 19th day of December, 1898.

Present: Hon. John H. V. Arnold, surrogate.

In the Matter of the Appraisal, under the Acts in Relation to Taxable Transfers of Property, of the Property of JOSEPH PLUMMER, Deceased.

On reading and filing the petition of Harry Plummer, as
5 executor of the last will and testament of Joseph Plummer, deceased, praying for the appointment of some competent person as appraiser under and in pursuance of the law in relation to taxable transfers of property, verified December 19, 1898; and on motion of Evarts, Choate & Beaman, attorneys for the said petitioner—

It is ordered, that Gilbert W. Minor, Esquire, be, and he hereby is, appointed such appraiser;

And it is further ordered, that said appraiser shall give the notice required by the said law in the manner and at the time therein set forth (and the said notice shall be fifteen days) to the following persons, and to all other persons known to have a claim or interest in the property of Joseph Plummer, the decedent named in the above-entitled proceeding, subject to the payment of said tax, viz:

Bird S. Coler, comptroller of the city of New York, number 280 Broadway, borough of Manhattan, New York city.

Harry Plummer, number 23 Gramercy park, borough of Manhattan, New York city.

Ella Plummer Brown, number 225 West Twenty-third street, borough of Manhattan, city of New York.

JOHN H. V. ARNOLD, *Surrogate.*

(Endorsed:) Filed December 19, 1898.

6 *Report of Appraiser.*

Surrogate's Court, County of New York.

In the Matter of the Appraisal of the Property of JOSEPH PLUMMER, Deceased, under the Act in Relation to Taxable Transfers of Property. Died October 24, 1898.

To the surrogate's court, county of New York:

I, the undersigned, who was, by an order made and entered on the 19th day of December, 1898, appointed appraiser under and in

pursuance of the law in relation to taxable transfers of property, a certified copy of which order is hereto attached, respectfully report:

First. That forthwith after my said appointment I duly took and subscribed the oath prescribed by statute, which said oath is hereunto annexed.

Second. That thereafter, on the 22d day of December, 1898, I duly gave notice by mail, postage prepaid, to all persons known to have or claim an interest in all property of said Joseph Plummer, deceased, subject to the payment of the tax imposed by said law, including those named by the surrogate in the said order, of the time and place I would appraise the property of Joseph Plummer, deceased, subject to the payment of the said tax; a true copy
7 of said notice, together with proof of mailing thereof, is also hereto attached.

Third. I further report that the following appearances were made before me in this proceeding:

Comptroller of the city and county of New York.

Messrs. Evarts, Choate & Beaman, for the petitioner.

Fourth. I further report that the decedent died on the 24th of October, 1898.

Fifth. I further report that at the time and place in said notice stated, to wit, on the 11th day of January, 1899, at No. 280 Broadway, in the city of New York, and at other and subsequent times and at divers places, I appraised all the property, being personal property of said Joseph Plummer, deceased, subject to the payment of said tax, at its fair market value, as follows, to wit:

Personal Estate.

Cash	$112 21	
$40,000 in U. S. Gov. bonds, 4%, due 1907	44,400 00	
1 $1,000 bond Wabash R. R. Co., 6% debenture, "B," due 1939	320 00	
50 shares stock of the Kingston & Pembroke Iron Mining Co., $25	15 00	
1,200 shares stock Comstock Tunnel Co. ($2)	48 00	
2 1st-mortgage income bonds of the Comstock tunnel, due 1949	4 00	
1st-mortgage income scrip of the Comstock tunnel	80	
Total personal estate		$45,075 01
8 From which I deduct:		
Medical and other expenses of illness	$886 45	
Undertaker and funeral expenses	337 60	
Expenses of administration	600 00	
Debts	18 89	
Commissions	640 75	
		1,683 69
Net personal estate		$43,391 32

Which is payable as follows:

To Emma Plummer Brown, daughter:

Interest as beneficiary in the income during her life of a trust fund consisting of $40,000 in amount at par of bonds of the United States $16,120

To Harry Plummer, son:

Contingent interest in remainder in trust fund of $40,000 of U. S. bonds (of above market value of $44,400) on death of the said Emma Plummer Brown, contingent upon, and to vest in possession only in case of her leaving no issue her surviving and his surviving her, which remainder is $27,271.32, and is not presently taxable, as in whom such contingent interest will ultimately vest cannot now be definitely ascertained.

Dated New York, May 31, 1899.

Respectfully submitted.

GILBERT W. MINOR, *Appraiser.*

9 Estate of JOSEPH PLUMMER, Deceased. *In re* Chapter 399, Laws of 1892.

STATE OF NEW YORK, INSURANCE DEPARTMENT,
ALBANY, *March 29th*, 1899.

SIR: In reply to your request of the 27th instant, I give below the present values desired:

Ella Plummer Brown, life annuity of $1,200, per annum.. $16,120

Very respectfully, LOUIS F. PAYN,
Superintendent.

To Hon. James M. Varnum, surrogate New York county, New York, N. Y.

(Endorsed:) Filed June 3, 1899.

Will of Joseph Plummer.

I, Joseph Plummer, of the city of New York, being of sound mind, memory and understanding, do in view of the uncertainty of life, make this my last will and testament as follows; that is to say:

First. I direct that all my just debts and funeral expenses be first paid out of my estate by my executor hereinafter named so soon after my death as shall be practicable.

Second. I give, devise and bequeath to my said executor forty thousand dollars at par of United States bonds, to have and to hold such bonds to him and his successors, *in trust*, during the lifetime of my daughter *Ella Plummer Brown* to collect and receive
10 the issues, income and profits thereof and pay the same over to my said daughter Ella Plummer Brown so long as she shall live, and upon the decease of my said daughter and the consequent termination of the trust above created for her use and benefit, the said trust fund, or the securities or property then representing the same, shall be conveyed to and divided and distributed between and amongst her issue living at the time of her decease, in equal proportions, share and share alike, *per stirpes* and not *per capita.*

But in case my said daughter should die without leaving any issue her surviving then it is my will that the said trust fund, or the securities or property representing the same, shall thereupon be conveyed to my son *Harry*, for his own use and benefit, if he shall survive her; and in case my said son Harry shall not survive her, then I direct that the said trust fund or the securities or property representing the same, shall thereupon be conveyed to and divided and distributed between and amongst my next of kin according to the laws of the State of New York regulating the distribution of the personal estates of persons dying intestate, in equal proportions, share and share alike, *per stirpes* and not *per capita*.

Third. I hereby direct and empower the said trustee of the trust by this my will created for the benefit of my said daughter Ella Plummer Brown, whenever for any reason the said United States bonds mature or become due, or shall be paid to reinvest the proceeds thereof in other United States bonds or in bonds secured by first mortgage on improved property in New York city.

Fourth. It is my last will and I hereby direct that when from any cause such as death or otherwise my said son Harry ceases to be trustee of said trust, the said trusteeship shall devolve upon the New York Life Insurance and Trust Company.

Fifth. If United States bonds for the sum of forty thousand dollars at par do not at the time of my death constitute a part
11 of my estate, then I give, devise and bequeath unto my said executor such a sum of money as shall be sufficient to purchase so many of such United States bonds as shall be requisite to make up such amount at par, and I direct that my executor invest such sum in such United States bonds and hold the same under the provisions of this my will relating to the trust created for the benefit of my daughter Ella Plummer Brown.

Sixth. All the rest, residue and remainder of my estate, real and personal of every kind and description and wheresoever situated of which I shall die seized or possessed, or in which at my decease I shall have any interest I give, devise and bequeath unto my said son Harry Plummer to have and to hold to him, his heirs, executors, administrators and assigns forever for his own use and benefit.

Seventh. I hereby nominate and appoint my said son Harry Plummer, to be the executor of this my last will and testament, and request that no bond be required of him as such executor, or as trustee aforesaid, and revoking all former wills by me made, do declare this to be my only last will and testament.

In witness whereof I have hereunto set my hand and seal this twenty-second day of July in the year one thousand eight hundred and ninety-seven.

JOSEPH PLUMMER. [L. S.]

Signed, sealed, published and declared by the said testator Joseph Plummer, as and for his last will and testament in the presence of us, who at his request, in his presence and in the presence of

each other have hereunto subscribed our names as witnesses this twenty-second day of July, eighteen hundred and ninety-seven.

CHARLES C. BEAMAN,
11 *East 44th St., New York City.*
JOHN B. B. FISKE,
216 *53rd Street, Brooklyn, N. Y.*
R. V. INGERSOLL,
156 *West 84th St., New York City.*

12 *Affidavit of Harry Plummer, Read on Behalf of Petitioner.*

Surrogate's Court, County of New York.

In the Matter of the Appraisal under the Transfer Tax Acts of the Property of JOSEPH PLUMMER, Deceased.

STATE OF NEW YORK, } ss.:
County of New York, }

I, Harry Plummer, being duly sworn, depose and say, as follows:

I. I am the sole executor of the will of Joseph Plummer, deceased.

II. That the said Joseph Plummer departed this life on the twenty-fourth day of October, 1898, in the borough of Manhattan, city of New York, and that he was, at the time of his death, a resident of the city, county and State of New York.

III. That the estimated value of the real property in this State, of which the said Joseph Plummer died seized is nothing. He died seized of none.

IV. That Schedule "A" annexed hereto and made a part hereof, contains according to the best of my knowledge and belief an itemized statement of all of the personal property of which
13 the said Joseph Plummer died possessed and the clear market value of each item thereof on the twenty-fourth day of October 1898, the date of the death of the said testator, such property amounting in the aggregate of the valuations in that behalf mentioned in said schedule, to the sum of $45,075.01.

V. That according to the best of my knowledge and belief, the debts owing by the said decedent at the time of his death were as follows, that is to say:

S. S. Thomas, for legal services	$5 00
Hotel Chelsea	13 89
Medical and other expenses of last illness	86 45
	$105 34

VI. That according to the best of my knowledge and belief the funeral expenses and expenses of administration are as follows:

Undertaker	$245 00
Funeral expenses	92 60
Executor's commissions—other expenses of administration (estimated)	600 00

HARRY PLUMMER.

Sworn to before me this 10th day of January, 1899.
JOHN S. SHEPPARD, JR.,
Notary Public, New York County.

14

SCHEDULE "A."

Referred to in the Foregoing Affidavit.

	Par value.	Clear market value.
Cash	$112 21	$112 21
$40,000 in U. S. Gov't 4% bonds, due 1907	40,000 00	44,400 00
One 6% debenture "B" bond of the Wabash R. R. Co. for $1,000, due 1939	1,000 00	320 00
50 shares of the capital stock of the Peoria & Eastern R. W. Co. of the par value of $100 each	5,000 00	175 00
100 shares of the capital stock of the Houston & Texas Cent. Railway Co., of the par value of $100 each	10,000 00	No market value.
100 shares of the capital stock of the Kingston & Pembroke Iron Mining Co. of the par value of $25 each	2,500 00	15 00
1,200 shares of the capital stock of the Comstock Tunnel Co. of the par value of $2 each	2,400 00	48 00
Two 1st-mort. income bonds of the Comstock tunnel, due 1919	1,000 00	4 00
1st-mort. income scrip of the Comstock tunnel for $200	200 00	80

15

300 shares of the capital stock of the Silver Islet Consolidated Mining & Lands Co. of the par value of $25 each	7,500 00	No market value.
750 shares of the capital stock of the Winnebago & O. K. Mining Co., of the par value of $20 each	15,000 00	No market value.
44 shares of the capital stock of the Kanawha & Ohio R. W. Co. 1st pref. of the par value of $100 each	4,400 00	"
30 shares of the capital stock of the Kanawha & Ohio R. W. Co. 2d pref. of the par value of $100 each	3,000 00	"
1st pref. scrip of the Kanawha & Ohio R. W. Co. for $80	80 00	"
Income bond scrip of the Ohio Central R. R. Co. for $200	200 00	"
30 shares of the capital stock of the New England Phonograph Co., of the par value of $100 each	3,000 00	"
20 shares American Wire Quilted Sole Asso.		"
$1,000 in the Hastings Brick Co.	1,000 00	No value known.
Judgment against Morland Conkling	122 98	Not collectible.
	$96,515 19	$45,075 01

16

Order Fixing Tax.

At a surrogate's court, held in and for the county of New York, at the county court-house, in the borough of Manhattan, in the city of New York, on the 19th day of July, eighteen hundred and ninety-nine

Present: Hon. James M. Varnum, surrogate.

In the Matter of the Appraisal, under the Acts in Relation to Taxable Transfers of Property, of the Property of JOSEPH PLUMMER, Deceased.

Upon reading the report of Gilbert W. Minor, Esquire, the appraiser duly appointed by an order made and entered herein on the

nineteenth day of December, eighteen hundred and ninety-eight, which said report is dated the thirty-first day of May, eighteen hundred and ninety-nine, and was filed herein on the third day of June, eighteen hundred and ninety-nine,

It is determined, ordered, adjudged and decreed:

First. That the cash value of the property mentioned and described in said report which is now subject to the payment of the tax under the laws in relation to taxable transfers of property, is as follows, that is to say:

17 Interest in such property of Ella Plummer Brown, daughter of said testator, as beneficiary during her life, of a trust fund consisting of $40,000 in amount, at par, of bonds of the United States..... $16,120 00

and that the tax to which the said interest of the said Ella Plummer Brown is liable is $161.20.

Second. That the person or persons who will be entitled to the remainder in the fund of forty thousand dollars of United States bonds at par which the said testator by his said will directed to be held in trust for the benefit of Ella Plummer Brown during her life, and who will be chargeable with the tax which will ultimately be payable in respect thereof, cannot be ascertained, and that no tax in respect of such remainders is now payable.

JAMES M. VARNUM, *Surrogate.*

(Endorsed:) Filed July 19, 1899.

Notice of Appeal to Surrogate.

Surrogate's Court, County of New York.

In the Matter of the Appraisal, under the Acts in Relation to Taxable Transfers of Property, of the Property of JOSEPH PLUMMER, Deceased.

SIRS: You will please take notice that Harry Plummer as
18 executor of the last will and testament of Joseph Plummer, deceased, hereby appeals to the surrogate of the county of New York from the order made and entered in the above-entitled proceeding on the 19th day of July, 1899, upon the report of the appraiser heretofore filed herein fixing the amount of the tax to be assessed upon the estate of the above-named decedent. The grounds upon which this appeal is taken, are that the only property mentioned in said order, upon which a tax is fixed consists of the interest of Ella Plummer Brown, the daughter of the said decedent as beneficiary during her life of a trust fund consisting of forty thousand dollars in amount at par of bonds of the United States of America, and that the State of New York has no power to impose any tax upon bonds of the United States of America, or upon any interest therein or upon the transfer of any such bonds or interest, and that the act of the legislature of the State of New York pur-

porting to impose such tax is void, and that such property mentioned in said report and order is not subject to any transfer tax.

Upon and by this proceeding and appeal the appellant intends to draw in question the validity of the said statute of the State of New York, purporting to impose such tax, and the authority exercised thereunder by said appraiser and said surrogate in so far as United States bonds are concerned, on the ground that they are repugnant to the Constitution and laws of the United States inasmuch as they impair the power of the United States to borrow money and impair the obligation of the contract contained in said bonds to the effect that the principal and interest of said bonds shall be exempt from taxation in any form by or under State, municipal or local authority and inasmuch as they are contrary to, and violate the statute of the United States, passed July 14, 1870, entitled "An act to authorize the refunding of the national debt," under and pursuant to which statute said bonds were issued, and which in terms exempted said bonds from taxation in any form by or under State, municipal or local authority. And this appellant in this proceeding specially sets up and claims a title, right, privilege and immunity under the Constitution of the United States and under said statute in respect to the exemption of said bonds from taxation in any form, as aforesaid, which title, right, privilege and immunity is violated and destroyed by said statute of the State of New York and the tax fixed, assessed and imposed thereunder by and pursuant to the order appealed from.

Dated New York, September 15, 1899.

Yours, &c., EVARTS, CHOATE & BEAMAN,
Attorneys for Petitioner, 62 *Wall Street, Borough of Manhattan, New York City.*

To Bird S. Coler, comptroller of the city of New York; the surrogates of the county of New York.

(Endorsed:). Filed Sept. 16, 1899.

Stipulation.

Surrogate's Court, County of New York.

In the Matter of the Appraisal, under the Acts in Relation to Taxable Transfers of Property, of the Property of JOSEPH PLUMMER, Deceased.

It is stipulated and agreed by and between the attorneys for the respective parties to the above-entitled proceeding, that the forty thousand dollars in amount at par of bonds of the United States of America, of which the said Joseph Plummer died possessed, and upon the interest in which of Ella Plummer Brown, a tax of $161.20 was fixed, assessed and determined by the order appealed from, consist of four per cent. bonds issued in the year 1877 and due in the year 1907, under and by virtue of, and pursuant to the statute of the United States, passed July 14, 1870, entitled

"An act to authorize the refunding of the national debt," which authorized the Secretary of the Treasury, among other things, to issue various classes of bonds, in the sums therein mentioned, including—

"a sum or sums not exceeding in the aggregate one thousand million dollars of like bonds * * * payable at the pleasure of the United States, after thirty years from the date of their issue, and bearing interest at the rate of four per cent. per annum; all of which said several classes of bonds and the interest thereon shall be exempt from the payment of all taxes or duties of the United States, as well as from taxation in any form by or under State, municipal, or local authority; and the said bonds shall have set forth and expressed upon their face the above specified conditions;"

and that pursuant to said statute there is set forth upon the face of each of said bonds the following clause, that is to say:

"The principal and interest are exempt from the payment of all taxes or duties of the United States, as well as from taxation in any form, by or under State, municipal or local authority."

Dated New York, December 13, 1899.

JABISH HOLMES, JR.,
EDGAR J. LEVEY,
Attorneys for the Comptroller.
EVARTS, CHOATE & BEAMAN,
Att'ys for Appellant.

21 *Order of Affirmance.*

At a surrogate's court held in and for the county of New York, at the county court-house, in said county, on the 22d day of December, 1899.

Present: Honorable James M. Varnum, surrogate.

In the Matter of the Appraisal, under the Acts in Relation to Taxable Transfers of Property, of the Property of JOSEPH PLUMMER, Deceased.

Harry Plummer, as executor of the last will and testament of Joseph Plummer, deceased, having appealed to the surrogate of the county of New York from the order of the surrogate's court, entered herein on the 19th day of July, 1899, confirming the report of Gilbert W. Minor, the appraiser, filed herein on the 3d day of June, 1899, and assessing and fixing the tax herein, and said appeal coming on to be heard, and after hearing William V. Rowe, Esq., of counsel for the appellant, and Jabish Holmes, Jr., Esq., of counsel for the comptroller of the city of New York, respondent, and due deliberation having been had,

Now, on motion of Jabish Holmes, Jr., attorney for the comptroller of the city of New York, it is

Ordered and decreed, that said order entered herein on the 19th

day of July, 1899, confirming said appraiser's report, and assessing the tax herein, be and the same hereby is in all respects affirmed.

Approved as to form.

EVARTS, CHOATE & BEAMAN,
Attorneys for Appellant.

(Endorsed:) Filed Dec. 22, '99.

22 *Notice of Appeal to Appellate Division, First Department.*

Surrogate's Court, County of New York.

In the Matter of the Appraisal, under the Acts in Relation to Taxable Transfers of Property, of the Property of JOSEPH PLUMMER, Deceased.

SIRS: You will please take notice that Harry Plummer, as executor of the last will and testament of Joseph Plummer, deceased, hereby appeals to the appellate division of the supreme court of the State of New York, in the first judicial department, from the order of the surrogate's court of the county of New York made and entered in the above-entitled proceeding on the twenty-second day of December, 1899, affirming the order of the surrogate's court herein made and entered on the 19th day of July, 1899, upon the report of the appraiser heretofore filed herein, fixing the amount of the tax to be assessed upon the estate of the above-named decedent, and also from the said order of the surrogate's court made and entered herein on the 19th day of July, 1899, confirming said appraiser's report dated May 31, 1899, and from the said report, and from each and every part of the said orders and said report.

Dated New York, December 22, 1899.

Yours, &c.,

EVARTS, CHOATE & BEAMAN,
Attorneys for Appellant, 52 Wall Street, Borough of Manhattan, New York City.

To Bird S. Coler, Esq., comptroller of the city of New York; the surrogates of the county of New York.

(Endorsed:) Filed December 22, 1899.

23 *Opinion of Varnum, S.*

On this appeal the sole question at issue is whether or not a transfer of United States bonds which took place since March 21, 1898, the date when chapter 88 of the laws of that year took effect, is taxable thereunder. The decedent died October 24, 1898, and the order fixing the tax from which this appeal is taken was made on July 19, 1899. It appears by stipulation that the bonds were issued under the act of July 14, 1870, which provides that they shall be exempt from taxation by the United States and "from taxation in any form by or under State, municipal or local authority," and that each bond contains a clause to that effect. Under these circum-

stances I have examined, with much interest, the elaborate brief of the learned counsel for the appellant, and frankly say that on principle there seems to be much to support their contention, but I am of opinion that the question is settled to the contrary by authority. It was established prior to the act of 1892 that transfers of United States bonds were subject to the tax (Matter of Howard, 5 Dem., 483; Matter of Carver, 4 Misc., 592; Matter of Tuigg's Est., 15 Supp., 548; see also Matter of Whiting, 2 App. Div., 590). And this was the view taken by apparently the only Federal court that has passed on the question (Wallace *v.* Myers, 38 Fed. Rep., 184, cited with approval in U. S. *v.* Perkins, 163 U. S., 625, at p. 629). Moreover, the court of appeals has indicated its opinion on the question of the power of the State to impose such a tax, *in dicta*, which I should consider controlling in the absence of any other authority (Matter of Whiting, 150 N. Y., 27, 31; Matter of Sherman, 153 N. Y., 1, at pages 3, 4, and 5). In the case last cited, as I read it, the court distinctly said that the legislature had power to tax the transfer of United States bonds, but that its language, as contained in
24 the act of 1892, failed to do so, and that the transfer of such securities had been properly held taxable under the acts prior to that of 1892. By the act of 1898 (chap. 88) the words which the court of appeals, in the Matter of Whiting and Matter of Sherman (*ubi supra*), construed as indicating an intention of the legislature not to tax bonds of the United States, were omitted from the section (sec. 242 of the tax law of 1896; sec. 22 of chap. 399 of Laws of 1892). It is but reasonable to suppose that, in making this omission, the legislature had in mind the decisions prior to 1892, and the judicial construction given to those words "over which this State has any jurisdiction for purposes of taxation," in the Whiting and Sherman cases, and intended by the act of 1898 to reach all "property," including bonds of the kind in question, as was possible before 1892. It is almost unnecessary to state that the theory on which the courts have held this kind of security taxable is that the tax is not upon the bonds themselves, but upon the transfer thereof. This distinction is firmly established in this State (see, besides the Sherman case, *supra;* Matter of Merriam, 141 N. Y., 479; Matter of Bronson, 150 N. Y., 1), and it seems to have been recognized in the Supreme Court of the United States (U. S. *v.* Perkins, 163 U. S., 625, which affirms Matter of Merriam, just cited).

The foregoing considerations lead me to dismiss this appeal.

25 *Stipulation.*

In the Matter of the Appraisal, under the Acts in Relation to Taxable Transfers of Property, of the Property of JOSEPH PLUMMER, Deceased.

It is hereby stipulated that the foregoing papers consist of true copies of the notices of appeal, petition, report of appraiser, orders made herein, and all the evidence had and taken in the above matter bearing on the issues decided and which are sought to be

reviewed by the appeals herein; that certification is hereby waived; and that the appeals herein shall be heard upon the said papers with the same effect as if certified, and that the within case be filed as the settled case on appeal herein.

Dated December —, 1899.

JABISH HOLMES, JR.,
Attorney for Comptroller of City of New York.
EVARTS, CHOATE & BEAMAN,
Attorneys for Petitioner.

The foregoing case is settled as containing all the proceedings and all the evidence had and taken in the above-entitled matter bearing on the issues recited and which are sought to be reviewed, and the same is hereby ordered to be filed by the surrogate.

Dated December 26, 1899.

JAMES M. VARNUM, *Surrogate.*

26 STATE OF NEW YORK, }
County of New York, } ss:

I, J. Fairfax McLaughlin, clerk of the surrogate's court of said county, do hereby certify that I have compared the foregoing copy of the notice of appeal, papers, and order in the matter of the appraisal under the acts in relation to taxable transfers of property of the property of Joseph Plummer, deceased, with the originals thereof in this office, and have found the same are true and correct copies of such originals, and the same with the originals thereof are all the papers upon which said order and decree was made.

In testimony whereof, I have hereunto set my hand and affixed the seal of the surrogate's court of the county of New York this 26th day of December, in the year of our Lord one thousand eight hundred and ninety-nine.

J. FAIRFAX McLAUGHLIN,
Clerk of the Surrogate's Court.

[SEAL.]
[10 cts. U. S. rev. stamp.]

27 *Order of Appellate Division Affirming Order of Surrogate.*

At a stated term of the appellate division of the supreme court of the State of New York, in the first department, held at the court-house, in the county of New York, on the 5th day of January, 1900.

Present: Honorable Charles H. Van Brunt, presiding justice. Honorable George C. Barrett, Honorable William Rumsey, Honorable Edward Patterson, Honorable Morgan J. O'Brien, associate justices.

In the Matter of the Appraisal, under the Acts in Relation to Taxable Transfers of Property, of the Property of JOSEPH PLUMMER, Deceased.

Harry Plummer, as executor under the last will and testament of Joseph Plummer, deceased, having appealed to the appellate division

of the supreme court of the State of New York, in the first department, from the order made in the above-entitled proceeding by the surrogate of the county of New York, dated and filed herein on the 22d day of December, 1899, which order affirmed an order of the said surrogate's court made and entered on the 19th day of July, 1899, confirming the report of the tax appraiser and assessing the tax herein, and said appeal having regularly come to be heard—

28 Now, after hearing William V. Rowe, Esq., of counsel for the appellant, and Jabish Holmes, Jr., Esq., of counsel for the comptroller of the city of New York, respondent, it is—

Ordered, adjudged and decreed, that said order of the surrogate appealed from be, and the same hereby is, affirmed, with costs to the respondent against the appellant.

Matter, &c., Property of JOSEPH PLUMMER, Dec'd.

Appellate Division of the Supreme Court, First Judicial Department.

CLERK'S OFFICE, NEW YORK CITY.

I, Alfred Wagstaff, clerk of the appellate division of the supreme court in the first judicial department, do hereby certify that the foregoing is a copy of the order made by said court upon the appeal in the above-entitled proceeding and entered in my office on the fifth day of January, 1900, and that the original papers upon which said appeal was heard are hereunto annexed.

In witness whereof I have hereunto set my hand and affixed the seal of said court this fifth day of January, 1900.

[L. S.] ALFRED WAGSTAFF, *Clerk.*

29 *Notice of Appeal to Court of Appeals.*

New York Supreme Court, County of New York.

In the Matter of the Appraisal, under the Acts in Relation to Taxable Transfers of Property, of the Property of JOSEPH PLUMMER, Deceased.

SIRS: You will please take notice that Harry Plummer, as executor of the last will and testament of Joseph Plummer, deceased, hereby appeals to the court of appeals from the order of the appellate division of the supreme court of the State of New York in the first judicial department, bearing date and entered in the above-entitled proceeding on the fifth day of January, 1900, affirming the order of the surrogate's court of the county of New York, made and entered in said proceeding on the twenty-second day of December, 1899, which affirmed the order of the surrogate's court made and entered herein on the nineteenth day of July, 1899, upon the report of the appraiser heretofore filed herein, fixing the amount of the tax to be assessed upon the estate of the above-named decedent and confirmed said appraiser's report dated May thirty-first, 1899, and from each and every part of said order.

And you will further please take notice that the grounds upon which this appeal is taken are that the only property mentioned in said order upon which a tax is fixed consists of the interest of Ella Plummer Brown, the daughter of said decedent, as beneficiary during her life of a trust fund consisting of forty thousand dollars in amount at par of bonds of the United States of America, and that the State of New York has no power to impose any tax upon bonds of the United States of America, or upon any interest therein or upon the transfer of any such bonds or interest, and that the act of the legislature of the State of New York purporting to impose such tax is void, and that such property mentioned in said report and order is not subject to any transfer tax.

Upon and by this proceeding and appeal the appellant intends to draw in question the validity of the said statute of the State of New York, purporting to impose such tax, and the authority exercised thereunder by said appraiser and said surrogate, in so far as United States bonds are concerned, on the ground that they are repugnant to the Constitution and laws of the United States, inasmuch as they impair the power of the United States to borrow money and impair the obligation of the contract contained in said bonds to the effect that the principal and interest of said bonds shall be exempt from taxation in any form by or under State, municipal or local authority, and inasmuch as they are contrary to and violate the statute of the United States, passed July 14, 1870, entitled, "An act to authorize the refunding of the national debt," under and pursuant to which statute said bonds were issued, and which in terms exempted said bonds from taxation in any form by or under State, municipal or local authority. And this appellant on this appeal specially sets up and claims a title, right, privilege and immunity under the Constitution of the United States and under said statute in respect to the exemption of said bonds from taxation in any form, as aforesaid, which title, right, privilege and immunity is violated and destroyed by said statute of the State of New York and the tax fixed, assessed and imposed thereunder by and pursuant to the order affirmed by the order appealed from.

Dated New York, January 5, 1900.

Yours, &c.,

EVARTS, CHOATE & BEAMAN,
Attorneys for Appellant, 52 Wall Street, Borough of Manhattan, City of New York.

To Bird S. Coler, Esq., comptroller of the city of New York; the surrogates of the county of New York.

STATE OF NEW YORK,
County of New York, } ss.:

I, J. Fairfax McLaughlin, clerk of the surrogate's court of said county, do hereby certify that I have compared the foregoing copy of the notice of appeal, papers and order in the matter of the ap-

praisal under the acts in relation to taxable transfers of property of the property of Joseph Plummer, deceased (together with a certified copy of the order of the appellate division, first department), with the originals thereof in this office, and have found the same are true and correct copies of such originals, and the same, with the originals, are all the papers upon which said order was made.

In testimony whereof, I have hereunto set my hand and affixed the seal of the surrogate's court of the county of New York, this 6th day of January, in the year of our Lord one thousand nine hundred.

J. FAIRFAX McLAUGHLIN,
Clerk of the Surrogate's Court.

[SEAL.]

[10-cent U. S. rev. stamp.]

32 *Opinion of Appellate Division.*

New York Supreme Court, Appellate Division, First Department.

In the Matter of the Appraisal, under the Acts in Relation to Taxable Transfers of Property, of the Property of JOSEPH PLUMMER, Deceased.

Opinion.

Per Curiam:

Order affirmed, with costs, on the authority of *In re* Sherman, 153 N. Y., 1.

33 *Opinion and Decision, January* 8, 1900.

In the Court of Appeals.

In re the Appraisal, under Acts in Relation to Taxable Transfers, &c., Property of JOSEPH PLUMMER, Dec'd.

Order affirmed, with costs, on authority of *In re* Sherman (153 N. Y., 1).

STATE OF NEW YORK:

Court of Appeals.

CLERK'S OFFICE.

I, W. H. Shankland, clerk of the court of appeals of the said State of New York, do hereby certify that I have compared the annexed copy of the decision and opinion in the proceeding entitled In the matter of the appraisal, under the acts in relation to taxable transfers of property, of the property of Joseph Plummer, deceased, with the original on file in this office, and that the same is a correct transcript therefrom and of the whole of said original.

In witness whereof I have hereunto set my hand and affixed my official seal, at the city of Albany, this eighth day of January, A. D. 1900.

W. H. SHANKLAND, *Clerk.*

34 At a surrogate's court held in and for the county of New York, at the county court-house, in said county, on the 8th day of January, 1900.

Present: Hon. Abner C. Thomas, surrogate.

In the Matter of the Appraisal, under the Acts in Relation to Taxable Transfers of Property, of the Property of JOSEPH PLUMMER, Deceased.

Harry Plummer, as executor of the last will and testament of Joseph Plummer, deceased, having appealed to the court of appeals from the order of the appellate division of the supreme court of the State of New York, bearing date and entered on the 5th day of January, 1900, which affirmed the order of this court bearing date and entered December 22nd, 1899, and the said appeal having been heard in the court of appeals, and thereafter by its remittitur the court of appeals having ordered and adjudged that the said order of the said appellate division affirming said order of this court as aforesaid should be affirmed with costs, and that the record of the proceedings in the said court of appeals be remitted to this court, to be proceeded upon according to law:

Now, upon reading said remittitur and upon motion of
35 Mr. Jabish Holmes, Jr., attorney for Bird S. Coler, comptroller of the city of New York, it is—

Ordered that the said remittitur be placed on file in this court; and it is—

Further ordered that the said order and judgment of the court of appeals be, and it hereby is, made the judgment and order of this court; and it is—

Further ordered that the order of this court made and entered herein on the 22nd day of December, 1899, be, and the same hereby is, in all respects affirmed, with costs to said Bird S. Coler, comptroller of the city of New York, of said appeal to the court of appeals in the sum of one hundred and fifty dollars and his disbursements upon said appeal, amounting to the sum of twenty dollars, making in all the sum of one hundred and seventy dollars.

ABNER C. THOMAS, *Surrogate.*

STATE OF NEW YORK, }
County of New York, } ss:

I, J. Fairfax McLaughlin, clerk of the surrogate's court of said county, do hereby certify that I have compared the foregoing copy of the notice of appeal, papers, and order in the matter of the appraisal, under the acts in relation to taxable transfers of property, of the property of Joseph Plummer, deceased (together with a certified copy of the order of the appellate division, first department; a certified copy of the remittitur of the court of appeals, and a copy of the order directing said remittitur to be filed), with the originals thereof in this office, and have found the same are true and correct copies

of such originals, and the same, with the originals, are all the papers upon which said order was made.

New York Surrogate's Seal.

In testimony whereof I have hereunto set my hand and affixed the seal of the surrogate's court of the county of New York this eighth day of January, in the year of our Lord one thousand nine hundred.

[Ten-cent U. S. internal-revenue stamp, canceled Jan. 8, 1900.]

J. FAIRFAX McLAUGHLIN,
Clerk of the Surrogate's Court.

36 [Endorsed:] Surrogate's court, county of New York. In the matter of the appraisal, under the acts in relation to taxable transfers of property, of the property of Joseph Plummer, deceased. Order on remittitur.

37 To the Honorable Rufus W. Peckham, justice of the Supreme Court of the United States:

And now comes Harry Plummer, by Evarts, Choate & Beaman, his attorneys, and complains that in the record and proceedings, and also in the rendition of an order or decree in the suit entitled "In the matter of the appraisal, under the acts in relation to taxable transfers of property, of the property of Joseph Plummer, deceased," which is in the surrogate's court of the county of New York, in the State of New York, on a remittitur from the court of appeals of the State of New York, being the highest court of law and equity of the said State in which a decision could be had remitting to the said surrogate's court of the county of New York the record in the said suit, with an order affirming an order and decree theretofore rendered in the appellate division of the supreme court of the State of New York on the 5th day of January, 1900, affirming an order of said surrogate's court of the county of New York made and entered on the 22nd day of December, 1899, in favor of Bird S. Coler, comptroller of the city of New York, and against Harry Plummer, as executor of the last will and testament of Joseph Plummer, deceased, and directing that an order be entered in said surrogate's court of the county of New York in favor of the said Bird S. Coler and against the said Harry Plummer, upon which direction and
38 order a decree of affirmance was entered in said surrogate's court of the county of New York on the 8th day of January, 1900, with costs, wherein was drawn in question the validity of a statute of the State of New York and of an authority exercised thereunder, on the ground of their being repugnant to the Constitution or laws of United States, and the decision was in favor of such their validity, all of which appears in the record and proceedings in said suit, manifest error- have happened, to the great damage of the said Harry Plummer, as executor as aforesaid.

Wherefore the said Harry Plummer, as executor as aforesaid, by his attorneys aforesaid, prays for the allowance of a writ of error

and such other proceedings as may cause the said error to be corrected by the Supreme Court of the United States.

EVARTS, CHOATE & BEAMAN,
Attorneys for Petitioner, 52 Wall Street,
New York City, N. Y.

Allowed January 9th, 1900.
R. W. PECKHAM,
Justice of the Supreme Court of the United States.

39 [Endorsed:] U. S. Supreme Court. Harry Plummer, as executor of the last will and testament of Joseph Plummer, deceased, plaintiff in error, *vs.* Bird S. Coler, comptroller of the city of New York, defendant in error. Petition for writ of error. Evarts, Choate & Beaman, attorneys for plaintiff in error, 52 Wall street, New York city, N. Y.

40 In the Supreme Court of the United States, October Term, 1900.

HARRY PLUMMER, as Executor of the Last Will and Testament of Joseph Plummer, Deceased, Plaintiff in Error,
vs.
BIRD S. COLER, Comptroller of the City of New York, Defendant in Error.

And now comes the plaintiff in error, by his attorneys and counsel, and respectfully represents that he feels himself to be aggrieved by the proceedings, order, and decree of the surrogate's court of the county of New York in the above-entitled cause, and assigns error thereto as follows—that is to say:

First. The court erred in that the only property upon the transfer or in respect of which a tax is fixed by the decree and order of said court consists of an interest of Ella Plummer Brown, the daughter of Joseph Plummer, deceased, as beneficiary during her life of a trust fund consisting of forty thousand dollars in amount at par of bonds of the United States of America, and that the State of New York has no power to impose any tax upon said bonds of the United States of America or upon any interest therein or upon the transfer thereof by the last will and testament of said Joseph
41 Plummer, deceased, or otherwise, and that the act of the legislature of the State of New York, known as the "Tax law" of said State, purporting to impose such tax, is in that respect void, and that said court erred in sustaining the validity of said act and in refusing to hold the same to be void, as aforesaid, and in refusing to hold that said bonds and the transfer thereof to or in trust for the benefit of the said Ella Plummer Brown, as aforesaid, by the last will and testament of said Joseph Plummer, deceased, are not subject to tax under said tax law of said State.

Second. The court erred in refusing to hold that said tax law and the authority exercised thereunder in imposing a tax upon said

bonds were and are repugnant to the Constitution and laws of the United States of America, on the ground that they impair the power of the United States of America to borrow money.

Third. The court erred in refusing to hold that said tax law and the authority exercised thereunder in imposing the tax in question upon said bonds impaired the obligation of the contract contained in said bonds, which exempts the principal and interest thereof from taxation in any form by said State.

Fourth. The court erred in refusing to hold that the said tax law and the authority exercised thereunder in imposing the tax in question upon said bonds are invalid and repugnant and contrary
42 to the statute of the United States passed July 14th, 1870, entitled "An act to authorize the refunding of the national debt," under and pursuant to which statute said bonds were issued, and which statute in terms exempts said bonds from taxation in any form by said State.

Wherefore the said Harry Plummer, as executor as aforesaid, the plaintiff in error herein, prays this honorable court to examine and correct the errors assigned and for a reversal of the order and decree of the said surrogate's court of the county of New York entered in the above-entitled cause.

HARRY PLUMMER,
As Executor of the Last Will and Testament of Joseph Plummer, Deceased,
By EVARTS, CHOATE & BEAMAN,
His Attorneys, and
WILLIAM V. ROWE &
TREADWELL CLEVELAND,
His Counsel.

43 [Endorsed:] U. S. Supreme Court. Harry Plummer, as executor of the last will and testament of Joseph Plummer, deceased, plaintiff in error, *vs.* Bird S. Coler, comptroller of the city of New York, defendant in error. Assignment of errors. Evarts, Choate & Beaman, attorneys for plaintiff in error, 52 Wall street, New York city, N. Y.

44 UNITED STATES OF AMERICA, *ss:*

Seal of the Supreme Court of the United States.

The President of the United States of America to the honorable the surrogate's court of the county of New York, State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said surrogate's court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit entitled In the matter of the appraisal, under the acts in relation to taxable transfers of property, of the property of Joseph Plummer, deceased, wherein was drawn in question the validity of a treaty or statute of

or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such
45 their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of Harry Plummer, as executor of the last will and testament of Joseph Plummer, deceased, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the ninth day of January, in the year of our Lord one thousand nine hundred.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

46 UNITED STATES OF AMERICA, *ss:*

To Bird S. Coler, comptroller of the city of New [illegible]rk, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the surrogate's court of the county of New York, State of New York, wherein Harry Plummer, as executor of the last will and testament of Joseph Plummer, deceased, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Rufus W. Peckham, associate justice of the

Supreme Court of the United States, this ninth day of January, in the year of our Lord one thousand nine hundred.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

47 In the Supreme Court of the United States.

HARRY PLUMMER, as Executor, &c., Plaintiff in Error,
vs.
BIRD S. COLER, Comptroller of the City of New York. } No. —.

Please enter my appearance as counsel for the defendant in error. I hereby waive the issuance of citation, and waive all security for costs or otherwise on this writ of error.

HORACE RUSSELL.

To James H. McKenney, clerk.

48 [Endorsed:] Certified copy of record.

Endorsed on cover: File No., 17,603. New York county surrogate's court. Term No., 489. Harry Plummer, as executor of the last will and testament of Joseph Plummer, deceased, plaintiff in error, *vs.* Bird S. Coler, comptroller of the city of New York. Filed January 9th, 1900.

No. 489.
Motion to advance.

SUPREME COURT U. S.
FILED
JAN 9 1900
JAMES H. McKENNEY,
Clerk.

Filed Jan. 9, 1900.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1899.

HARRY PLUMMER, as Executor of the Last Will and Testament of Joseph Plummer, deceased,
Plaintiff in error,

vs.

BIRD S. COLER, Comptroller of the City of New York,
Defendant in error.

No. 489

MOTION TO ADVANCE.

And now come the plaintiff in error and the defendant in error, and jointly move this Honorable Court to advance this cause upon the docket and hear it at as early a day as the convenience of the Court will permit. The reasons for this motion and application are as follows, that is to say:

This cause involves questions of great public importance—immediately important to the United States, to the State of New York, and to the many other States having inheritance tax laws—arising under the execution of the tax and revenue laws of New York. The Surrogate's Court of the County of New York, whose order and decree is now brought up for review, is, together with the defendant in

error, virtually the assessing officer or authority of the State, for the purpose of fixing taxes under its transfer, or inheritance tax law.

The question presented on this writ of error relates to the constitutionality and validity of the inheritance tax sections of the "Tax Law" of the State of New York, in so far as they are applied to the taxation of the so-called transfer, by will or intestate succession, of *bonds of the United States*, it being contended on the part of the plaintiff in error that the tax impairs the borrowing power of the United States, under the Constitution, and is in violation of, and repugnant to, the statute of the United States passed July 14th, 1870, known as the Refunding Act, and in violation, and destructive of the obligation, of the contract contained in said bonds, inasmuch as the statute and contract *exempt* said bonds from taxation "in any form" by any State.

This question has been determined by the courts of the State of New York, and by all other courts which have had the question under consideration, in favor of the validity of the State tax laws, on the ground that the tax is upon the right or privilege to transfer and transmit by testamentary disposition or intestate succession, and not upon the bonds themselves.

One of the chief questions involved, therefore, relates, in a measure, to the nature of the tax itself, as well as to its incidence.

There is now pending in this Court, undetermined (in Nos. 458 and 459, October Term, 1899), the question as to the validity of the inheritance tax features of the War Revenue Act of 1898 (Sections 29 and 30), as applied to United States bonds. It is claimed there, also, that the tax is valid, because placed on the privilege and not on the bonds.

As this whole question as to the scope and nature of this species of tax is thus presented in both classes of cases, it is extremely important that the Court should have both before it at the same time.

There are now outstanding upwards of *one thousand and twenty-six millions* of United States bonds subject to both the Federal and State tax. The combined tax may average at least ten per cent., which would mean a *deduction of over ten million and a quarter of dollars from the value of these bonds—to say nothing of future issues. An attack is thus made upon the entire present and future borrowing power of the United States.*

The question as to the validity in this respect of both the State and the Federal laws, is arising in a great many jurisdictions throughout the country from day to day, and counsel are not aware of any question of greater public importance than that thus presented. As an open question, it is, necessarily, constantly embarrassing the officials having to do with the execution of such tax laws.

Under these circumstances counsel respectfully suggest that it is essential that this unusually important constitutional question should be determined, *in all its aspects*, as speedily as may be, and, above all, that the Court should have before it, when determining the question which arises under the War Revenue Act, the very similar question, so far as the nature, scope and incidence of the tax are concerned, which is presented by this writ of error.

Respectfully submitted,

WILLIAM V. ROWE,
TREADWELL CLEVELAND,
Counsel for Plaintiff in error.

~~JABISH HOLMES, Jr.,~~ Horace Russ
Counsel for Defendant in error.

HARRY

BIR

In Er

WILLIAM
TREADWE

No. 489.

FILED
FEB 24 1900
JAMES H. McKENNEY,
Clerk.

Br. of Rowe & Cleveland for P. C.

STATE INHERITANCE TAX ON UNITED STATES BONDS.

Filed Feb. 24, 1900.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 489.

PLUMMER, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF JOSEPH PLUMMER, DECEASED,
Plaintiff in Error,

vs.

D. S. COLER, COMPTROLLER OF THE CITY OF NEW YORK,
Defendant in Error.

Error to the Surrogate's Court of the County of New York, in the State of New York.

BRIEF FOR PLAINTIFF IN ERROR.

EVARTS, CHOATE & BEAMAN,
Attorneys for Plaintiff in Error.

ROWE,
CLEVELAND,
Of Counsel.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1899.

HARRY PLUMMER, as Executor of the Last Will and Testament of Joseph Plummer, deceased,
Plaintiff in Error,

vs.

BIRD S. COLER, Comptroller of the City of New York,
Defendant in Error.

No. 489.

In Error to the Surrogate's Court of the County of New York, in the State of New York.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

This case comes before this Court on error to the Surrogate's Court of the County of New York—a court of probate, and the tribunal of the State of New York upon which is imposed, by the laws of that State, the duty to ascertain and fix all taxes assessed under the succession or inheritance tax law of the State, called its "Law of Taxable Transfers," and to determine all questions arising thereunder—and presents the single question, as to whether that law is constitutional and valid, in so far as the tax, provided for therein, is assessed upon the testamentary transfer of, or succession to, *bonds of the*

United States of America, issued in the exercise of its borrowing power.

The only property subject to the tax in this case, and in respect to which the tax is determined and fixed by the judgment and decree below, consists of *the interest of Ella Plummer Brown, a daughter of Joseph Plummer, deceased, as beneficiary under a trust created for her benefit by his will, in which the testator specifically bequeathed to the plaintiff in error*, his son, as the executor of his will, forty thousand dollars in amount at par of *bonds of the United States, upon trust to pay the income thereof to his said daughter during her life* (Will, pp. 6-7). The cash value of this interest is fixed at $16,120, and the tax thereon at $161.20 (Decree, p. 10).

The testator, his daughter and his son were all residents of the State of New York (p. 3). The bonds in question, which, it appears (pp. 5, 11-12), formed a part of the testator's estate, of which he died possessed, are United States four per cent. bonds, due in 1907, issued in 1877 under and pursuant to the Refunding Act of July 14, 1870, entitled "An Act to authorize the Refunding of the National Debt" (16 Sts. at Large, 272). By this act, as it appears from this record (p. 12), the Secretary of the Treasury is authorized to issue various classes of bonds in various sums—

> "all of which said several classes of bonds and the interest thereon shall be *exempt from the payment of all taxes or duties of the United States, as well as from taxation* IN ANY FORM *by or under State, municipal or local authority; and the said bonds shall have set forth and expressed upon their face the above specified conditions*" (p. 12).

In accordance with the terms of the act, each of these bonds belonging to this testator, and thus bequeathed by him, contains the stipulation that—

> "The principal and interest are *exempt from the payment of all taxes or duties of the*

> *United States, as well as from taxation* IN ANY FORM *by or under State, municipal or local authority*" (p. 12).

Section 230 of the "*Tax Law*" of the State of New York (See *Appendix* to this brief, under separate cover, which contains the "*Law of Taxable Transfers*," now a part of the "*Tax Law*"), provides that the particular Surrogate having jurisdiction shall—

> "appoint a competent person as appraiser to fix the fair market value (at the time of the transfer thereof) of *property* of persons *whose estates shall be subject to the payment of any tax imposed by this article.*"

Accordingly, in referring to the report of the appraiser so appointed in this case, the decree below provides (p. 10)—

> "That the cash value of the *property* mentioned and described in said report, which is *now subject to the payment of the tax* under the laws in relation to taxable transfers of property, is as follows, that is to say:
>
> *Interest in such property* of Ella Plummer Brown, daughter of said testator, as beneficiary during her life, of a trust fund *consisting of $40,000 in amount, at par, of bonds of the United States*, $16,120, and that *the tax to which the said interest* of the said Ella Plummer Brown is liable is $161.20."

Section 222 of the *Tax Law* provides that—

> "*Every such tax shall be and remain a* LIEN *upon the* PROPERTY TRANSFERRED *until paid.*"

And Section 224 declares that—

> "Every executor, administrator or trustee shall have *full power to sell so much of the property* of the decedent as will enable him to pay such tax in the same manner as he might be entitled by law to do for the pay-

> ment of the debts of the testator or intestate. Any such administrator, executor or trustee having in charge or in trust *any legacy or property* for distribution subject to such tax shall *deduct the tax therefrom.* * * * *He shall not deliver or be compelled to deliver any specific legacy or property subject to tax* under this article to any person *until he shall have collected the tax thereon.*"

By Section 222, *the tax is due and payable at the time of the transfer*, and by Section 242 (and Section 220), the transfer is defined as the passing of the property *at the time of death*, by "*inheritance, descent, devise, bequest, grant, deed, bargain, sale or gift.*"

As the only property involved in this case consists of these United States bonds, thus *specifically bequeathed*, the questions here presented are uncomplicated by any considerations foreign to those applicable to that particular species of property.

We assume that the Court will take judicial notice of the fact (See letter of *Secretary of Treasury*, in *Appendix* to this Brief) that all the United States bonds, now outstanding and running to maturity, have been issued under one or another of the three following mentioned acts of Congress, viz : the Act of July 14, 1870, commonly called the Refunding Act (16 Sts. at Large, 272), the Act of January 14, 1875, commonly called the Resumption Act (18 Sts. at Large, 296), and the Act of June 13, 1898 which is frequently called the War Revenue Act (30 Sts. at Large, 448, 467, § 33).

In the *Appendix* to this brief is contained a statement, based upon statistics recently obtained by us from the *Treasury Department*, showing the *total issues, the amounts of the bonds of the respective issues outstanding* on December 31, 1899 (brought down to January 31, 1900), which amounts cannot well have changed since then to an extent large enough to be material with reference to the present purposes, and also contain-

ing *a copy of the form of the bonds*, like those in the case at bar, issued under the Refunding Act.

From this statement it appears that *the whole amount of the outstanding bonds* of the United States appears to be, or rather to have been on January 31, 1900, a little over *one thousand and twenty-six millions of dollars*, and the small reduction since that date is not of consequence enough to be worth considering with reference to the present question.

All these outstanding bonds, like those in the case at bar (p. 12), *contain on their face* this statement, placed there under the mandate of the statute:

> "*The principal and interest are exempt from the payment of all taxes or duties of the United States as well as from taxation in any form by or under State, municipal or local authority.*"
>
> See copy of letter, &c., from the Treasury Department in the *Appendix* to this brief.

The Refunding Act of July 14, 1870, under which these outstanding bonds to the amount of upwards of $570,000,000, including those involved in this case, were issued, contains, in its first section, the following provision, viz.:

> "That the Secretary of the Treasury is hereby authorized to issue, in a sum or sums not exceeding in the aggregate two hundred million dollars, coupon or registered bonds of the United States, in such form as he may prescribe, and of denominations of fifty dollars, or some multiple of that sum, redeemable in coin of the present standard value, at the pleasure of the United States, after ten years from the date of their issue, and bearing interest, payable semi annually in such coin, at the rate of five per cent. per annum; also a sum or sums not exceeding in the aggregate three hundred million dollars of like bonds, the same in all respects, but payable at the pleasure of the United States, after fifteen years from the date of their issue, and bearing interest at the rate of four and a half

per cent. per annum; also a sum or sums not exceeding in the aggregate one thousand million dollars of like bonds, the same in all respects, but *payable at the pleasure of the United States after thirty years from the date of their issue, and bearing interest at the rate of four per cent. per annum; all of which said several classes of bonds and the interest thereon shall be exempt from the payment of all taxes or duties of the United States, as well as from taxation in any form by or under State, municipal or local authority; and the said bonds shall have set forth and expressed upon their face the above specified conditions,* and shall, with their coupons, be made payable at the treasury of the United States. But nothing in this act, or in any other law now in force, shall be construed to authorize any increase whatever of the bonded debt of the United States."

16 Sts. at Large, 272.

The Resumption Act of January 14, 1875, the outstanding bonds under which amount to upwards of $257,000,000, provides as follows:

"Sec. 3. * * * And to enable the Secretary of the Treasury to prepare and provide for the redemption in this act authorized or required, he is authorized to use any surplus revenues, from time to time, in the treasury not otherwise appropriated, and *to issue, sell, and dispose of, at not less than par, in coin, either of the descriptions of bonds of the United States described in the Act of Congress approved, July fourteenth, eighteen hundred and seventy, entitled 'An act to authorize the refunding of the national debt,' with like qualities, privileges, and exemptions,* to the extent necessary to carry this act into full effect, and to use the proceeds thereof for the purposes aforesaid. And all provisions of law inconsistent with the provisions of this act are hereby repealed."

18 Sts. at Large, 296.

The War Revenue Act of 1898 does not in terms refer to the exemption provision in the Refunding

Act of 1870, but it *contains an independent provision on the subject in substantially the same language* as that of the Refunding Act, viz.:

> "And the bonds herein authorized shall be *exempt from all taxes or duties of the United States, as well as from taxation in any form by or under State, municipal or local authority.*"
>
> 30 Sts. at Large, 467, § 33.

This Act of 1898 differs, however, from the former acts in that it does not make it mandatory upon the officials that this exemption shall be declared upon the face of the bonds. Nevertheless, the Treasury Department (See letter in *Appendix*), as an executive act construing the statute, *has printed precisely the same contract of exemption on the face of these bonds as in the case of all other outstanding bonds.*

Section 3701 of the Revised Statutes of the United States, also *declares*, generally, the exemption (*it would exist independently thereof*) of all Government obligations *from State, local and municipal taxation.*

We think it will be convenient to introduce in this place *a copy of the form of the bonds, like those in the case at bar*, issued under the Refunding Act of 1870—the others are substantially like this—and we, therefore, give it as follows (See Treasury Statement in *Appendix*):

"*Four per cent. loan of 1907, consols.*

(Face of bond.)

1877 1907. M

FOUR PER CENT. CONSOLS OF THE UNITED STATES.

A 4

Principal and interest payable in coin One M Thousand at the Treasury of the United States.

Washington, July 1st, 1877.

THE UNITED STATES OF AMERICA

Are indebted to.....*or assigns*, in the sum of One Thousand Dollars. This bond is

issued in accordance with the provisions of an act of Congress entitled "An act to authorize the refunding of the National Debt, approved July 14, 1870," amended by an act approved January 20, 1871, and is redeemable at the pleasure of the United States after the first day of July, A. D. 1907, in coin of the standard value of the United States on said July 14, 1870, with interest, in such coin, from the day of the date hereof, at the rate of four per centum per annum, payable quarterly on the first day of October, January, April, and July in each year. *The principal and interest are exempt from the payment of all taxes or duties of the United States, as well as from taxation in any form by or under State, municipal, or local authority. Transferable on the books of this Office.*

Date of issue.....
Entered.....
Recorded.....

.....
Register of the Treasury.

Act of July 14th, 1870.

(Back of Bond.)

Act of July 14th, 1870. Amended January 20th, 1871.

Transfer (NO.....).

Original Date.... Original No....

1000. FOUR PER CENT. CONSOLS. 1877–1907.

For value received,.....*assign to*..... the within registered bond of the United States, and hereby authorize *the transfer* thereof on the books of the Treasury Department.

Dated....., 18..

State of....., County of.....

Town of.....

Personally appeared before me the above named *assignor*, known or proved to me to be the.....payee of the within bond, and

signed the above *transfer*, acknowledging the same by his free act or deed.

Witness my hand, official designation, and seal.

NOTE.—The execution and acknowledgment of the *above assignment*, when not made at the Treasury Department, must be before a U. S. judge, U. S. district attorney, clerk of a U. S. court, collector of customs, collector or assessor of internal revenue, U. S. Treasurer or Assistant Treasurer, or the president or cashier of a national bank, or, if in a foreign country, before a U. S. minister or consul. In all cases the officer must add his official designation, residence, and seal if he has one. When the *assignment* is made by a corporation, it must be named as the assignor; when by a guardian, *trustee, executor, administrator*, an officer of a corporation, *or any one in a representative capacity*, proof of his authority to act must be produced to the officer before whom the *assignment* is made and must accompany the bond. *Assignors* must be identified as known and responsible persons to the satisfaction of the officer.

One Thousand."

Here, we have *a plain contract provision for an assignment and transfer by a living assignor to a living assignee, and, on death, to a "trustee, executor, administrator * * * or any one in a representative capacity."* This is a part of the contract of the Federal Government with its bondholders, expressly conferring the power to assign, even on death—a contract which would in any event be implied, but is here *expressed* in full.

SPECIFICATION OF ERRORS.

The plaintiff in error accordingly contends that the judgment and decree below is erroneous in levying and confirming this tax, for the reason that the *Tax Law* of the State of New York, in respect

to taxable transfers, so far as it seeks or purports to tax the transfer of bonds of the United States, and particularly the bonds here in question, is unconstitutional and void, because proceeding in defiance of the paramount contract of exemption in the bonds and in the Refunding Act, and because imposing a burden upon the borrowing power of the Federal Government, and, especially, on the grounds more fully stated in the assignment of errors (pp. 21–22).

THE QUESTION INVOLVED, AND ITS DISPOSITION BELOW.

The tax has been heretofore sustained by the State courts as one imposed, not on the bonds, but on the transfer thereof, or the succession thereto, as a *statutory privilege* conferred by the State, and the chief and overshadowing question involved in this case, apart from the emphatic terms of the contract of exemption, which speaks for itself, is, therefore — Whether this so-called Transfer Tax, whatever its nature, and whether it be technically a tax upon the transfer or upon the bonds themselves, amounts, in substance and effect, to *a burden and impediment upon the borrowing power of the United States*— whether, in other words, with this alleged Transfer Tax operating upon the transfer of Federal securities, the United States could obtain, as theretofore, the *same* favorable rates of interest, the *same* high market price for its bonds (now always purchased at a premium), and have the *same* absolutely unlimited market and number of lenders, ready to compete for its evidences of indebtedness.

The learned Surrogate of New York County (Surrogate VARNUM) frankly admitted that, on principle, the plaintiff in error's contention appeared to be well-founded, but held that he was bound to confirm the tax, in view of the repeated *dicta* and decisions of appellate courts (pp. 13–14).

The Appellate Division of the New York Supreme

Court, and thereafter the Court of Appeals, affirmed the order of the Surrogate's Court, on the authority of *Matter of Sherman*, 153 N. Y., 1, without writing any formal opinion on the question (p. 18). In the case cited, in a *dictum*, the Court of Appeals declared that the ax was one solely upon the privilege —a mere creature of the State—of transferring the bonds at death, and did not touch the bonds themselves.

Summary of Argument.

This is, however, necessarily but a very brief and imperfect summary of the argument which follows, and is not intended to take the place of, or exhaustively to state, all the points involved in that argument, the length of which is amply justified by the consideration that there is now presented, for the first time in this court, this momentous question, as to the conflict between the inheritance tax laws of the States and the borrowing power of the United States—a question always heretofore determined by the State courts against the United States.

Upon this question, then, the plaintiff in error submits, among others, the following propositions:

I.

The *paramount* contract of exemption in the Federal statute and in the bonds, created in the exercise of the Federal borrowing power—a *supreme* governmental power—operates in favor of all succeeding holders, whether claiming by assignment *inter vivos* or by testamentary or intestate succession, and precludes the imposition, in respect to the bonds, of any State tax, whether styled an inheritance tax or otherwise.

II.

The question, whether this tax be, technically, one upon successions and transfers or one directly upon the property transferred, is utterly immaterial, and begs the main question under discussion, as to the real *burden* of the tax on the Federal borrowing power.

The Federal Government, in the nature of things, could not, under such a tax, obtain the same favorable rates of interest, the same market price for its bonds and other securities, and have the same unlimited class of investors to appeal to, as it could obtain and would have, if no such tax existed. This proposition cannot be open to serious discussion. To assume that argument is necessary, is at the same time to assume that all argument would be in vain.

Death comes to all. Every bond held by natural persons must, therefore, become subject to this tax. It is a form of transfer which, unlike transfers *inter vivos*, is not a matter of choice, and is bound to take place at the death of the holder.

As this Court said, in its *unanimous* (158 U. S., at p. 630) utterance on the subject of the unlawful attempt to tax the *income* derived from municipal bonds, "*it is* OBVIOUS"—no argument could be required to show—that the tax would "*operate upon the power to borrow*," and "have a *sensible influence on the contract.*"

Pollock v. *Farmers' Loan & Trust Co.*, 157 U. S., at p. 586.

The constitutional question thus presented is a purely *practical* one, to be determined, largely as a matter of fact, in the light of common knowledge and every-day experience.

Nicol v. *Ames*, 173 U. S., 509, 516.

The constitutional limitation and the acts of Congress on the same subject, which exempt the securities of the United States, issued under the borrow-

ing power, from State taxation, are, in the nature of things, regulations, *not for the benefit of the lender and the holder of the securities, but solely for the benefit of the Government, in order that it may obtain,* BY PREFERENCE, *the most favorable possible rate of interest and the most favorable possible market and price for its securities.* If that market would be in any way limited, the price lessened, or the rate of interest increased, by the operation of any State law, so as to be less favorable after such enactment than before, then that law must yield to the paramount power of the Federal Government.

III.

It is no answer to suggest that the State's power of control, by taxation or otherwise, must be tested by its power, presumably understood by all, absolutely to withhold or destroy the right of testamentary disposition or intestate succession—even as to Federal securities. Such an absolute power does not exist at the present day—certainly not without constitutional limitations and restrictions—and never did exist in the State of New York. If it ever did exist at all, it was purely as an abstract proposition, in a republic or democracy like ours, for, if the State could take all property at death, the property of each citizen and of each legislator, all of whom go to make up the entity called a State, would thus be taken, and no representative legislative body could ever be induced to enact such a law. *Representative government is an absolute, practical safeguard,* as against such a trespass (*McCulloch* v. *Maryland*, 4 Wheat., at p. 428).

The right of testamentary disposition and intestate succession is not in any sense a statutory privilege, but is a natural right, and, from immemorial usage at least, has come to be regarded as an inalienable common-law right, which is fully secured by the State Constitution and laws of the State of New York, and protected by the Fourteenth

Amendment of the Federal Constitution, and by provisions similar thereto in the State Constitution. The State may *reasonably regulate* this property right; but it has *no proprietary interest* in the property itself, and *cannot confiscate* the property by a destruction of the right. Nor can it, by withdrawing the right, throw open all property to the riotous operation of the law of the strongest. The necessities of the case and our civilization and social order forbid, even if there were no express constitutional limitation.

The suggestion as to this possible power of the State to take all property at death is, in other words, at this day and in this Republic, purely imaginary. The mere suggestion of such a power in the State is a relic of barbarism, of a time when the wealth of the world was in land, held under feudal tenures, and to assume its existence now, as a power to be practically exercised, is to assume that we have returned to the condition of a barbaric people.

To call this a privilege tax, because it happens to operate in respect to United States bonds, does not help the matter. The State has the power to levy such a tax *in general*, but the point is, that, *whatever such a tax be called, it, like all other taxes, is unlawful, if it operates so as to burden*, or come in conflict with, any of the *paramount Federal powers.*

IV.

This imaginary suggestion, whatever its merits, that the State might possibly take to itself *all* property at death, and withhold all right of testamentary disposition or intestate succession, would never operate, *as a practical consideration*, upon the minds of investors in government securities. It is not a practical suggestion at the present day. The possibility, however, that the State might, *by tax or other imposition, burden and impair* the value and present scope of the right

of testamentary disposition and succession, by placing burdens upon these Federal securities like the tax here in question—*even if regarded as a tax on a privilege to be exercised in respect to the bonds* —would be *a vital and practical* consideration, easily comprehended, when presented to the minds of possible lenders and investors.

We are dealing with *a purely practical* question, and are concerned only with what, *in the course of business*, must affect the minds of ordinary investors and lenders, *as matter of fact, and from a practical, every-day point of view.*

We do not refer to, or discuss, with any great elaboration, the various *State* decisions, for the reason, primarily, that they are the determinations of a district sovereignty, adjudicating upon the rights of the Nation, and naturally jealous of their own, while we are now before the Supreme National tribunal for the adjudication of national rights. We have, however, elaborately discussed *all of the grounds, or supposed grounds*, upon which the State cases are deemed to rest. As this is the first case, on this subject, to come before this Court, although the States have for many years sustained their right thus to tax Government bonds, under the guise of a succession tax, we have made the discussion of the question reasonably exhaustive.

POINTS.

First Point.

By the provisions of the Refunding Act of July 14, 1870 (16 *Sts. at Large*, 272), *and the exemption clause inserted in the bonds themselves issued under that act, there is created in favor of the original holders of the bonds so issued, and the persons who, from time to time, may be their assigns or successors in interest, no matter how the devolution of title may arise,* A CONTRACT EXEMPTION *from the payment of all State taxes, in whatever form imposed.*

This is certainly and absolutely so in respect of United States taxation, and it is so, at least to a certain effect and extent, in respect of State taxation, although the State is not directly a party to the exemption contract. The Act and exemption clause in the bonds purport to declare and create such exemption *as well from State as from Federal taxation.* As to State taxation, the status is, that, under the conclusively settled construction by this Court of the provisions of the Constitution of the United States giving to Congress the power to borrow money on the credit of the United States (Art. 1, Sec. 8, Cl. 2), and to make all laws which shall be necessary and proper for carrying into execution the granted powers (Art. 1, Sec. 8, Cl. 18), in connection with the provision, that the Constitution and the laws of the United States, made in pursuance thereof, shall be the *supreme law of the land* (Art. 6, Cl. 2), the States are under an absolute inhibition to retard, impede, *burden* or in any manner control the exercise by Congress of its power to borrow money, or its legitimate action in respect of such borrowing, and that a tax under-

taken to be imposed by the States, upon or in respect of the obligation given by the United States to the lender of money, is in substantial effect a tax on the exercise of the constitutional power to borrow, and consequently repugnant to the Constitution. But, there being no express definition by the Constitution as to what particular kind or degree of taxation, or other action of the State, should be regarded as having a tendency to retard, impede, burden or control the exercise by the Federal Government of its borrowing power, there may, or might, be some ground for dispute as to details in respect of that particular subject.

Inasmuch as, in case of any clashing between the State's attempted exercise of its own taxing power for its own benefit, and the claim by the Federal Government for the protection of its borrowing power against being retarded, impeded, burdened or controlled by such attempted action of the State, the paramount right is vested in the Federal Government (*Lane County* v. *Oregon*, 7 Wall., 71, 76), we submit that, in virtue of its constitutional right to make *laws necessary and proper for carrying into execution its granted powers*, Congress fairly had the right to define and declare by law, in so far as it might deem expedient so to do, what particular exercise by the State of its taxing power would retard, impede, burden or impair the borrowing power of Congress, or deprive it of such exemption from interference by the State as by the Constitution it was entitled to, and that such definition and declaration by Congress ought to be held conclusive upon the State, unless it could be shown clearly and decidedly to transcend the limits of the constitutional right of Congress; but, irrespective of this consideration, there was another which clearly made it proper for Congress, to declare, in the statute authorizing the bonds, and on the face of the bonds thus authorized, the exemption from State taxation and its permanent continuance.

This exemption of United States bonds, or of the

debt from the Government which the bonds represent, from State taxation, is created *for the benefit of the Federal Government and not for the benefit of the lender of money to it;* although, of course, where the Government borrows money and the terms of the loan, as between it and the lender, are adjusted upon the basis and understanding that the creditor shall be entitled to the benefit of such exemption from State taxation, and the Government thus gets in its bargain with the lender the benefit of such exemption *in futuro*, it is essential that the right to such exemption shall be vested in the creditor, and his successors in interest, in such absolute shape as that it cannot subsequently be taken away or impaired.

The constitutional right of exemption from State taxation, in respect of the exercise of the borrowing power of Congress, being a power for the benefit of the Federal Government, that government has the right to waive it in respect of any particular loan or transaction, either absolutely or partially, and under such conditions as it may impose in respect of the waiver; provided always, of course, that such waiver be made before other parties have acquired, in virtue of dealings with the Federal Government, a right to have the exemption continue in their favor. The Federal Government has, in some instance or instances, made this waiver. A notable instance of this is found in the Forty-first Section of the Act of June 3, 1864, relating to the national banks, which were to a certain extent instrumentalities of the Government. Its forty-first section, as construed by this Court in the case of *Van Allen* v. *The Assessors*, 3 Wall., 573, *permitted* the taxation of the shares of the national banks by State authorities, *provided* the taxation should not be at a greater rate than was assessed upon other moneyed capital in the hands of the individual citizens of the State.

Plainly, it was the purpose and is the effect of this exemption clause, created under the Refunding

Act of July, 1870, to assure the holders of United States bonds issued under that Act from any subsequent impairment of their right to such exemption by any future legislation of the States or the United States, by making this *an exemption by express contract*, and to define, declare and make absolutely effectual, in favor of the bondholders and their successors in interest, the exemption to the complete extent specified in the Act, and, in effect, we submit, the Federal Government did substantially guarantee to the holders of these United States bonds this perpetual exemption from both Federal and State taxation to the stipulated extent and effect, and we submit that the intent is clear to make this exemption from State taxation about as broad as it could be, namely, an exemption against taxation "*in any form*" by or under State authority. As to the operation of the exemption thus defined, and by the Federal Government pledged to the bondholder, we alsos ubmit that the State must fairly be held to be bound by it unless it could be clearly and certainly shown that it goes beyond the right of exemption which Congress might lawfully claim in virtue of its powers possessed under the Constitution, and here there can be no ground whatever for any assertion that the declared exemption goes beyond the proper limit.

Congress, in providing that the full amount of principal and interest on the bonds shall be paid without dimunition by State taxation, has, as in the case of the exercise of other Federal powers, as, for instance, in the establishment of salaries of all Federal officers, or in enactments under the power to regulate commerce, created a *supreme law of the land*, absolutely binding, as a prohibition, upon the States.

Dobbins v. *Com. of Erie Co.*, 16 Pet., 435, 449-50.

Gulf, Colo. & Santa Fe R'y. Co. v. *Hefley*, 158 U. S., 102 and 105.

A privilege granted by Congress, like the exemption of these bonds, by statute, from State taxation, cannot be burdened by the States.

Harman v. *Chicago*, 147 U. S., 396.

As to the extent of the exemption created by and under this Refunding Act, we have this further to say: As respects the exemption from the taxing power of the *United States*, it is indisputable that the provision in question is an exemption, not merely from direct taxation, but from all indirect taxation as well. Under the Constitution of the United States, the taxes which the Federal Government is authorized to impose are divided into two great classes, to be imposed upon entirely different bases, viz., direct taxes, to be laid under the rule of apportionment between the States in proportion to population, and indirect taxes, which must be imposed upon the basis of uniformity throughout the nation, which two bases are radically different in their application, inasmuch as direct taxation, by the rule of apportionment, necessarily precludes the uniformity throughout the nation, in respect of the burden upon individual taxpayers, which is required for indirect taxation.

By the Constitution "duties, imposts and excises" are unquestionably described or reckoned as indirect taxes, they being required to be laid by the rule of uniformity. The exemption from Federal taxation being, in the first word used in it—"taxes"—as broad as the word "taxes" used by the Constitution in its grant to Congress of the taxing power, would, under ordinary construction of language and according to natural and common understanding, be understood by investors to embrace exemption from *all* United States taxes whatsoever, whether direct or indirect, and so, we submit, it must be regarded in the construction of this Act.

But the Act and the bonds do not leave the matter to this alone. The declared exemption is from "*all*

taxes or *duties*," and "*duties*" are indisputably in the class of indirect taxes.

The exemption, in respect of both Federal and State taxation, held out to investors whom the government desired to attract, by way of inducement to them to make the investment, exhibits, in its language, an intent to create the exemption in broad, general and comprehensive terms.

Authorized Federal taxation being authoritatively divided into two great classes, and it being, of course, so understood by Congress, a declared exemption from *both* the classes of tax must be regarded as embracing, in the view of Congress, an exemption from *all* Federal taxation whatsoever.

But beyond this, in respect of a tax of the particular kind which is now in dispute, namely, a tax upon the passing of property by will or intestacy, there is no possible room for doubt that, by this Act and by the exemption clause inserted in the bonds, there was designed to be, and was, created an express exemption from any *Federal tax of this particular character. For nearly six years prior to the passage of this Refunding Act of July, 1870*, there had been in existence, under the Internal Revenue Act of June 30, 1864, Section 124, *a provision imposing a tax by the United States upon legacies and distributive shares of personal property passing by will or intestacy*, to the same substantial effect, and in almost precisely the same language as the provision of such nature in the War Revenue Act of 1898, which section of the Internal Revenue Act of June 30, 1864, designated this particular species of tax as a tax or duty, and in some parts of that act as a "*duty*" merely, and during these six years the government had been regularly collecting this "*duty*" upon personal property passing by will or upon intestacy. There is, therefore, no room to doubt that, when, by this exemption clause in the Act of July 14, 1870, Congress created an exemption from *all duties* of the United States, they did create an exemption from *this particular duty*, which they had been so long

collecting under that name, or any other duty of like nature.

In respect of taxation by the States, of course varying from each other in respect of methods and classes of taxes, and subject to subsequent variations of such classes or methods indefinitely, this form or method of declaring an exemption from Federal taxation could not well be used, and consequently, in respect of the *States*, the exemption was declared to be from "*taxation in any form*" by or under their authority.

Under the circumstances and in view of the manifest intention of the act to hold out this exemption from taxation by way of inducement to investors, which was to be accomplished by declaring the exemption on the face of the bonds themselves, we submit that there is no just ground to suppose or believe *otherwise than* that it was the intent of the act to make the exemption from State taxation at least as broad, sweeping and comprehensive as the exemption from Federal taxation, and in this connection we refer to a very significant fact. At the time of the passage of this Refunding Act of July 14, 1870, with this exemption clause, there was in existence an act of February 25, 1862 (12 Sts. at Large, 346), which declares as follows:

> "And all stocks, bonds and other securities of the United States held by individuals, corporations or associations, within the United States, shall be *exempt from taxation* by or under State authority."

See also, to the same effect—

U. S. Rev. Sts., § 3701.

To make assurance doubly sure, in respect of the completeness of the exemption from State taxation as one of the conditions of the bonds issued under this Refunding Act of July 14, 1870, we find that the exemption declared in it varied from the exemption in the *then existing* statute of February 25, 1862, by the insertion in the act of July 14, 1870,

of the peculiar and unusual words "*in any form*," that is to say, there being *already* a provision that such bonds shall be *exempt from taxation by or under State authority*, there is substituted for it a provision that they shall be exempt from taxation "*in any form*" by or under State authority, and it cannot be assumed that this was done without a reason; nor can it fairly be denied that the purpose and intent was to declare to intending investors that, beyond peradventure, there should be *no taxation of any kind*, by or under State authority, upon or in respect of these bonds or the debt which they represented.

And here we would refer to certain remarks of Chief Justice MARSHALL in his judgment delivered in the case of *McCulloch* v. *Maryland*, 4 Wheat., 316 (involving the question of the constitutionality of the charter of the Bank of the United States). In that opinion, from which there was *no dissent*, he had occasion to consider elaborately the effect of the provision in the United States Constitution giving to Congress the power to make all laws which shall be "necessary and proper" for carrying into effect the granted powers (Article 1, Section 8, Clause 18), the argument in support of the validity of the charter of the bank being in a large measure based on this clause, and (on page 413) the Chief Justice says in reference to the argument of the opponents of the charter:

> "But the argument on which most reliance is placed, is drawn from the peculiar language of this clause. Congress is not empowered by it to make all laws which may have relation to the powers conferred on the Government, but such only as may be, *necessary* and proper, for carrying them into execution."

And then he refers to the arguments of counsel that under this language there must be *an actual necessity*, and that fitness and propriety, usefulness, &c., would not suffice. Then (on page 414) comes

the remark to which we particularly refer in this connection:

> "The word 'necessary' is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases. This comment on the word is well illustrated by the passage cited at the bar from the 10th Section of the 1st Article of the Constitution. It is, we think, impossible to compare the sentence which prohibits a State from laying, imposts or duties on imports or exports except what may be '*absolutely* necessary' for executing its inspection laws, with that which authorizes Congress 'to make all laws which shall be *necessary and proper* for carrying into execution' the powers of the general government, without feeling a conviction that the convention *understood itself to change materially the meaning of the word 'necessary' by prefixing the word 'absolutely.'*"

We have but to apply that same principle to the language of the exemption clause in the Refunding Act of July 14, 1870, in comparison with the language of the then existing act of February 25, 1862, in order to perceive the importance, for purposes of construction, of subjoining the words "*in any form*" to the words "from taxation."

Second Point.

But, if the question of the right of the State to impose the tax now in question be considered merely with reference to the INHERENT LACK OF POWER OF THE STATE TO IMPOSE SUCH A TAX, *because of the provisions of the Constitution of the United States bearing upon that question, without any aid from the statute of the United States under which these bonds were issued, or the exemption clause contained in the bonds, we conceive it to be entirely clear that the tax in question is unconstitutional,* BECAUSE IMPAIRING AND BURDENING THE BORROWING POWER OF THE UNITED STATES.

It will not be denied that, under the principles of law settled by the decisions of this Court seventy years ago, and ever since practically applied, there is a constitutional prohibition upon the imposition by the States of taxes upon or in respect of the bonds or indebtedness of the United States. For determining the question whether a particular tax, *e. g.*, the one here in question, comes within this constitutional inhibition upon the States, we have to inquire upon what basis this restraint of the taxing power of the State, in respect of bonds or loans of the United States, rests—upon what reason it is founded and how far, and to what, it extends.

In pursuing such inquiry, we take note, in the first place, of the fact that, notwithstanding the unquestionable constitutional restraint imposed upon the States' power in this respect, the Constitution *does not directly mention* the subject of State taxation upon loans or securities of the United States, nor contain one word touching that particular subject, *in express language* or specifically.

This general constitutional limitation upon the States has been most explicitly stated by this Court

in the *Bank of Commerce case*, where, in referring to the earlier cases on the subject of the exclusive powers and absolute sovereignty of the Federal Government, the Court said:

> "The doctrine maintained in those cases is that the powers granted by the people of the States to the General Government, and embodied in the Constitution, are supreme within their scope and operation, and that this Government may exercise these powers in its appropriate departments, free and unobstructed by any State legislation or authority. That within this limit this Government is sovereign and independent, and *any interference by the State governments, tending to the interruption of the full legitimate exercise of the powers thus granted, is in conflict with that clause of the Constitution which makes the Constitution and the Laws of the United States passed in pursuance thereof 'the supreme law of the land.'*
>
> "The result of this doctrine is, that *the exercise of any authority by a State Government trenching upon any of the powers granted to the General Government is, to the extent of the interference, an attempt to resume the grant in defiance of constitutional obligation;* and more than this, if the encroachment or usurpation *to any extent* is admitted, the principle involved would carry the exercise of the authority of the State to an indefinite limit, *even to the destruction of the power.*"
>
> *Bank of Commerce* v. *New York City*, 2 Black, 620, at page 632.

The principles involved and the authorities were fully considered by this Court in—

> *Home Insurance Co.* v. *New York*, 134 U. S., 594, at pages 598–599.

The Court there said:

> "That the bonds or obligations of the United States for the payment of money cannot be the subject of taxation by a State is familiar law settled by numerous adjudications of this

> Court. It is a tax upon the exercise of the power of Congress to borrow money; a tax which, if permitted, could be limited in amount only by the discretion of the State, and *might therefore be carried to an extent impairing, if not destructive of, the efficiency of the power, to the serious detriment of the general government.* * * * NOR CAN THIS INHIBITION UPON THE STATES BE EVADED BY ANY CHANGE IN THE MODE OR FORM OF THE TAXATION, *provided the same result is effected—that is, an* IMPEDIMENT *is thereby imposed to the exercise of a power of the United States. That which cannot be accomplished directly cannot be accomplished indirectly. Through all such attempts the Court will look to the end sought to be reached, and if that would trench upon a power of the government, the law creating it will be set aside or its enforcement restrained.*"

This constitutional restraint of the State is based upon two clauses of the Constitution, namely: The right given to Congress to borrow money upon the credit of the United States, and the provision, that the Constitution and the laws of the United States made in pursuance thereof shall be the supreme law of the land. Upon these two provisions and *upon nothing else whatsoever* (save laws which may be or may have been enacted by Congress for carrying into execution the powers granted to it) rests this restraint upon the States' power of taxation.

The restraint exists as the *effect and result of* these two provisions of the Constitution, as construed by this Court, and the ground of the restraint, as we find it substantially stated in the opinion of the Court as delivered by Chief Justice MARSHALL in the year 1829, in the case of *Weston* v. *Charleston*, 2 Pet., 449, is this, viz.: That the Constitution having given to the United States the express power to borrow money, the United States, in the exercise of this power, is entitled to be entirely free from the prejudicial effect of any action of the State, in respect

of its borrowing or its terms or incidents, including the adjustment between it and the lender of the terms of the contract loan, in respect of rate of interest or otherwise, and that in respect of contracting the loan and adjusting the terms with the lender, the United States is entitled to be free from being in any wise *burdened* or impeded by any action of the State. It has been unquestioned law for seventy years that in respect of the bonds or other securities of the United States issued for loans obtained by it, the State is wholly without power to impose taxes upon either the original lender of the money or upon his successors in interest as creditors; yet unquestionably this is *not* a concession or privilege granted to the *bondholders or creditors* of the United States *for or in respect of their own pecuniary interest by way of preference to them over other citizens having property. But* this exemption of the creditor exists, because, inevitably, the imposition, after the Government has borrowed the money, of a tax burden upon the lender or his successor in interest, *must in effect fall upon the Government*, because the fact that the lender or his successors will be subject to such a tax burden *in futuro* inevitably enters into and to a certain extent controls the terms upon which the lender will consent to make the loan. The future tax, if there be one, will, of course, be imposed upon the creditor, for or in respect of the debt which he holds as property, and not upon the debtor for or in respect of the debt which it owes. The Government of the United States has the clear power to borrow money, but, to make the exercise of that power effective, it must find some one who will consent to lend. Of course, it can always find some one who will lend at some rate of interest and on some terms. But the Government, of course, desires, as is its right, to obtain the loan at a low rate of interest and upon as favorable terms as the conditions of the money market at the time being will allow upon the basis of complete exemption from State

taxation, to which it is entitled under the Constitution.

If, at the time of fixing by negotiation the terms of the loan it is perceived that there will be or is likely to be a subsequent burden of State taxation imposed upon or in respect of the obligation of the debtor held by the creditor, the lender demands, and there being no system of forced loans, insists, that he will not make the loan at the current rate of interest *for loans of such description free from tax*, unless there be allowed to him in the adjustment of the terms of the loan a sum adequate to cover the future burthen of the anticipated tax; and it is by way of provision against this anticipated future burthen of tax that the tax exemption is vested in the creditor for the benefit and advantage of the debtor, so as to give to the lender the benefit of the exemption from State taxation which the Constitution has given to the debtor.

It is for this reason, and for this reason only, that this exemption from taxation is granted to the creditor, *not for his benefit primarily, but to give to the Federal Government a preference as a borrower*, and because, if it were not granted to the creditor, it would be impossible to prevent the prejudicial effect, upon the exercise by the Federal Government of its power to borrow, of the subsequent imposition by the State of a tax burden upon the lender.

We will quote a few words from the opinion of Chief Justice MARSHALL in that case (*Weston* v. *Charleston*, 2 Pet., 449, 468). He there says:

> "The right to *tax the contract to any extent when made must operate upon the power to borrow before it is exercised and have a sensible influence on the contract.* The extent of this influence depends on the will of a distinct government [*i. e.* the State]. *To any extent, however inconsiderable, it is a burden on the operations of Government.* It may be carried to an extent which shall arrest them entirely. *It is admitted by the counsel for the*

> *defendants that the power to tax stock must affect the terms on which loans will be made.*"

The Chief Justice then goes on to state some arguments of counsel against the natural effect of this proposition, and proceeds to show in language which we need not take the trouble to quote the utter lack of foundation for such arguments.

The Chief Justice also refers in the opinion, as applicable to the case in hand, to a proposition which the Court had laid down some years previously upon a kindred question, as to the right to impose a tax upon the exercise of other powers or rights of the Federal Government, *viz.*, a clause in the opinion in the case of *McCulloch* v. *Maryland*, 4 Wheat., at p. 436, in which the Court had said that—

> "the States have no power, *by taxation* OR OTHERWISE, to *retard, impede, burden or in any manner control* the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government," and the Chief Justice then says: "We retain the opinions which were then expressed."

He then considers the question whether a certain exception which the Court had stated, in regard to certain collateral matters, in laying down this rule in the case of *McCulloch* v. *Maryland* was applicable (as counsel had claimed) to the case then at bar (that is *Weston* v. *Charleston*, and holds that the *exception has no application* to the case in hand, and concludes with saying (2 Pet., at p. 468):

> "The tax on the Government stock is thought by this Court to be *a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the Constitution.*"

The question at issue in the case at bar is whether this particular tax is within the general principle

thus laid down by this Court seventy years ago in the *Charleston case*, and which has been so steadfastly maintained ever since. In the various discussions which have taken place in reference to the validity of taxes of this character, in so far as they affect United States bonds, great stress has frequently been laid upon the question whether or not the tax is a "*tax laid upon the bonds*," and for aught we know our adversaries may lay such stress in their arguments in the case at bar; as to which we have to say, that any such proposition must be *an attempt to dispose of the question at issue by raising an utterly immaterial issue*. The question really at issue is, *not* whether this is a tax laid *upon the bonds, but whether* it is a tax which, when imposed, will fall *upon and have to be paid by the boudholder or his successors* in interest for the time being, and which, therefore, it must be assumed, will be borne in mind and allowed for in the adjustment, between the original lender and the Government, of the terms of the loan. If the natural result of the ultimate imposition of such a tax would be to influence the mind of the original lender in respect of the terms or rate of interest upon which he would consent to make the loan, then in effect the imposition of such a tax is, under the doctrine established in the *Charleston case*, a tax upon the contract of loan, and in substance and effect a burden imposed upon the borrowing power of the United States.

If we subject the question at issue to this test, there surely can be no doubt that the tax in question must be held to be a burden upon the borrowing power.

In determining the question whether the mind of the intending lenders or would-be or might be, lenders would be so affected, we must of course assume that they would be persons of ordinary inteligence, and that in deciding as between the proposed loan to the Government and other possible investment of their money, at what rate of interest and on what

terms, otherwise, they would make the loan to the Government, or whether they would find it to their interest to make it at all, they would have in mind not merely the *gross sum* which they would receive, in the way of interest, during the continuance of the loan, and upon the ultimate repayment of the capital, and if there were to be imposed upon them (respectively) as holders of the bonds given for this loan, or upon their successors in intererest, taxes of this description, as of any other description, they would naturally estimate, as best they might, the amount of the tax burdens to which they or their successors would be subjected, and take care that the estimated amount of the tax burden should in some way be made good to them in adjustment of the terms of the loan, either in respect of charge or rate of interest, or of premium or discount, as a condition without which they would not find it to be to their interest to make the loan; and if the bonds had a long time to run, they would have in mind as well the imposition of the burden upon their successors in interest as upon themselves alone, for if they should wish to sell the bonds in their lifetime the burden would be in like manner taken into account by the buyer in respect of the terms at which he would purchase, and if their intent or expectation were to hold the bond as long as they should live and leave it to their families after their death, unless it should mature and be paid off in their lifetime, they naturally would take into account in like manner whatever burdens of this character would fall upon their families, or, in case of change of circumstances in that respect, upon other persons to whom they might choose to give the bonds, and govern themselves accordingly in respect of making or not making the loan, and its terms.

And here, before proceeding further with the consideration of this particular point, we desire to call attention to two adjudicated points having a bearing upon the subject, namely:

1. That it makes *no difference, however inconsiderable may be the amount of the tax burden* imposed by the State tax.

Weston v. *Charleston*, 2 Pet., at p. 468.

2. That *it makes no difference* in respect of the unconstitutionality of the imposition of a tax by a State upon, or in respect of, the bonds or the loans of the United States, that *the tax is not at all discriminating*, but is *merely the inclusion of United States bonds in a general tax* upon taxpayers at precisely the same rate as imposed upon other property.

Bank of Commerce v. *New York City*, 2 Black., at pp. 629-631.

It is, however, hardly necessary to make these citations, as the principles referred to are quite familiar to the Court and are of daily application. The exemption from the ordinary State and city taxation of United States bonds, which taxpayers of New York enjoy, is *not from any discriminating taxation.* We think no State or municipality has ever ventured to impose any such discriminating taxation on United States bonds, but *the exemption is from including United States bonds in the general mass of taxable estate.*

The result of this doctrine, so firmly established and long maintained, is, that the United States in obtaining loans has a very important and valuable *preference* over other borrowers of money in respect of the rate of interest at which it can borrow, and it has exercised this right, to its pecuniary benefit, to the extent of hundreds of millions, and we may properly refer to the circumstance thatthere is now pending in the Senate of the United States a bill under which it is proposed that the Government shall undertake the enterprise of again refunding a large amount of indebtedness at the rate of interest of *two per cent. per annum*, which certainly is very far below the current rate of interest, even in these

days, upon bonds which are regarded as practically as safe as Government bonds, such as bonds of some of the first class railroad companies, but which do not enjoy the advantage of exemption from taxation.

And it may not be amiss to remark that, if this preferential right of the Government in respect of its borrowing is allowed to be impeded by permitting the imposition of State taxes of this character, affecting the original lenders of money and their successors in interest, the extent to which such burden upon the Government's powers, heretofore unburdened in this respect, may be increased, is not easily to be computed.

This particular practice of raising money by taxing property passing from the dead to the living has become very fashionable, and has proceeded, and apparently is likely to proceed, with giant strides.

The first exercise of this power in the State of New York was in the year 1885, and was limited to collateral relatives and strangers, with an exception from its operation of the "father, mother, husband, wife, children, brother and sister and lineal descendants born in lawful wedlock, and the wife or widow of a son and the husband of a daughter, and the societies, corporations and institutions now exempted by law from taxation."

This act (New York Laws of 1885, Chap. 483), imposes a tax upon all property which shall pass by will or by the intestate laws of the State, and imposes *such tax as a percentage of the fair market value of such property.* Subsequently, and we think in 1891 (Chapter 215 of the New York Laws of that year), the tax was varied so as to be imposed upon lineal descendants (though at a less rate), where the amount should exceed a specified sum.

As yet the principle of graduating the rate in a tax of this character, by increasing the amount in proportion to increase of the amount of property of the deceased over a certain specified minimum, has not been adopted by the State of New

York, but it seems to be not at all unreasonable to anticipate that the example set by the Federal Government in this respect will in due time be followed by the State.

An examination of the records of the debate in Congress in the year 1894, when there was under consideration the so-called Wilson Revenue Law (the income tax provisions of which fell by the judgment of this Court), will show, we think, that attempts to apply this principle of graduated taxation, increasing with the amount of property involved, were made, quite strongly pressed and *voted down*. But four years afterwards, in the year 1898, we find that this principle of graduated taxation found great acceptation in Congress, in respect of this very subject of taxes upon the disposition of personal property by will or upon intestacy.

The 29th section of the War Revenue Law of 1898 (30 Statutes at Large, 448) imposes taxes at certain specified rates, varied as had theretofore been usual with reference to the nearness of kindred of legatees or distributees to the decedent, but likewise graduated as had *not* previously been usual, according to the amount of property involved. By that act, after imposing taxes at a certain rate where the amount does not exceed $25,000, it provides that where the amount exceeds $25,000, but is not more than $100,000, the tax shall be multiplied by one and a half; that where the amount exceeds $100,000, but is not more than $500,000, the tax shall be multiplied by two; and where it exceeds a million it shall be multiplied by three. The result of this is that, if a decedent has property to the extent of ten hundred and one thousand dollars, and happened to have lost his wife and children (if he ever had any), and he has no more remote kindred for whom he cares particularly so as to wish to make them legatees, but desires to leave his property, say, to an adopted child, or to some friend dearer to him than a brother, or for some

worthy charity or public benefaction dear to his heart, and with reference to the endowment of which he has for years been taking care of his property, his estate is subjected to a tax, or whoever takes under his will is subject, according to the ruling of the Internal Revenue Department, to a tax, at the rate of *fifteen per cent. upon the whole capital*, which upon his million dollars would be $150,000. The persons or institutions to whom he might choose to give his property might *likewise be subject* to a tax of *five per cent. under the State law* of New York, but if that State should choose, as there seems to be reason enough to suppose it will in time, to follow the example of the United States Government in this respect, his estate or legatees might likewise be subjected to the burden of paying another sum of one hundred and fifty thousand dollars, making a sum total of three hundred thousand dollars taken out of his million.

This Court already has under advisement the question whether there is any exemption of United States bonds from United States taxation under this War Revenue Act, the Court below having decided that there is no such exemption. The present status, then, is that, under the law, supposing the rulings of the courts below in respect of these two taxations, State and Federal, to be sustained by this Court, and that the State should *not* increase its present exaction on this subject, the effect would be that, upon the disposition of the property of a decedent, twenty per cent. might be taken off from the capital by the taxing power. Now, if we suppose such a burden of taxation is allowed to be imposed upon the *two per cent.* bonds, which the Government is now proposing to issue, the result will be that an amount equal to the entire interest for ten years might be thus taken away, and the effect might be, further, that, if the lender on the new two per cent. basis happened to be, say a man 65 years old, and should die at what the Scriptures reckon the natural age of man, say at three

score years and ten, at that time, if his estate came to be distributed, and the twenty per cent. should have to be paid, he would have received during the five years in interest ten per cent. upon the capital, which might perhaps be considered as refunded and applied towards payment of the taxes. So that *only ten per cent.* would have to be *subtracted from the capital*, as compensation for the honor of having lent the money to the Government for five years *without any interest*.

Now, the practical question, for legal purposes, is whether the existence of such a status as that would not naturally be taken into account by a lender or intending or supposed lender, when invited to make the loan, and whether it would not affect the terms on which he would consent to make the loan, if he consented to make it at all. As we think that the necessary answer to such a question is sufficiently obvious, we need not make further comment on the subject, although we ought perhaps further to say that, under the War Revenue Act of 1898, it needs not that the estate should be as much as a million, to feel the heavy burden of the graduated rule. Instead of trebling the original rate of five per cent. where the amount is more than a million, it merely doubles the rate, where the amount only exceeds $100,000, so that if the amount were, say, $101,000, the highest tax rate would be *only* ten per cent.

We desire now to refer to certain further authorities in relation to State and Federal taxation upon or in respect of United States bonds.

In the so-called Income Tax Cases (*Pollock* v. *Farmers' Loan and Trust Company*, 157 U. S., 429; *Rehearing*, 158 U. S., 601), besides the main question at issue, there was a subordinate question as to the right of the United States to tax the income upon State or municipal bonds. The question of the right or disability of the State to tax the bonds or evidences of indebtedness of the United States stands upon the same ground substantially as the

right or disability of the United States to tax the bonds or evidences of indebtedness of the State or its municipalities. Certainly, the State has no greater rights in this respect than the United States.

In this case of *Pollock* v. *The Farmers' Loan and Trust Company* there was upon the main question a very elaborate and vigorous dissent, the Court, upon that question, standing five to four, but upon this question of the right of the United States to tax State or municipal bonds, the Justices of the court were *unanimous.*

The amount of the tax involved in that case was a tax of two per cent. upon the income for the term of five years, to which the act of 1894 was in this respect limited.

Supposing the State or municipal bonds to have borne four per cent. interest, the tax imposed was eight-one hundredths of one per cent. upon the capital in each year, or for five years *an aggregate of four-tenths of one per cent. upon the capital.* And this tax was by this Court held to be unconstitutional and void, not by reason of any statute or constitutional provision so expressly enacted, for there was none, but because of the inherent want of power of the United States Government thus to interfere with the powers of the State.

Thus the amount of percentage of the aggregate of State and Federal taxation on United States bonds which this Court is asked to sustain in the case already under advisement in respect of Federal taxation and the present case, taken together, is a percentage fifty times as great as the percentage-amount of the tax which was held to be unconstitutional in the case of *Pollock* v. *Farmers' Loan and Trust Co.*

This unanimous decision of this Court, in respect of Federal taxation upon State or municipal bonds, is the law of this case, in relation to State taxation upon United States bonds, unless our adversaries can succeed in establishing such a distinction between the nature or burden of the tax

as will sustain the tax in the one case while defeating it, because of unconstitutional in the other; and with a view to a determination of the question whether there is such a difference as to give ground for such a difference in the result, we propose to examine with some care into the decision of the Court in the case of Federal taxation on State or municipal bonds, and the grounds or reasons upon which that decision was based.

Upon this subject we quote from the opinion of the Court delivered by Chief Justice FULLER as follows (157 U. S. Reports, pp. 583-4):

> "The Constitution contemplates the independent exercise by the Nation and the State, severally, of their constitutional powers.
>
> "*As the States cannot tax the powers, the operations, or the property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a State.*"

Then, there is a discussion whether there is any substantial difference, in respect of the question at issue, between taxation imposed upon the State and taxation imposed upon its municipalities, resulting in the decision that there is no such difference. And then (on pages 585-6) the Chief Justice proceeds to say:

> "But we think the same want of power to tax the *property or revenues of the States or their instrumentalities exists in relation to a tax on the income from their securities*, and for the same reason, and that reason is given by Chief Justice Marshall in *Weston* v. *Charleston*, 2 *Pet*., 449, 468, where he said: '*The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract.* The extent of this influence depends on the will of a distinct government.

> *To any extent, however inconsiderable, it is a burthen on the operations of government. It may be carried to an extent which shall arrest them entirely. * * * The tax on government stock is thought by this Court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States and consequently to be repugnant to the Constitution.'* Applying this language to these municipal securities, *it is obvious that taxation on the interest therefrom would operate on the power to borrow before it is exercised, and would have a sensible influence on the contract, and that the tax in question is a tax on the power of the States and their instrumentalities to borrow money, and consequently repugnant to the Constitution.*"

And, as the result of the opinion, in which the majority of the Court concurred, the Court directed a reversal of the decree of the Court below, with the direction to grant the relief asked for in respect of the tax on the rents and income of real estate and on the income from municipal bonds.

The Court was then evenly divided upon certain other points involved, in consequence of which there was a rehearing, and the report on the *rehearing* is in 158, U. S., 601.

We now quote from the opinions of three of the Justices, who, while dissenting from the opinion of the majority of the Court on the main question involved, agreed with it on this particular question. Two of these opinions are found in the report on the original hearing and the other one in the report on the rehearing.

From the opinion of Mr. Justice WHITE on the original hearing (157 U. S., at p. 652), we quote as follows:

> "In regard to the right to include in an income tax the interest upon the bonds of municipal corporations, I think the decisions of this Court, holding that the Federal Government is without power to tax the agencies of the state government,

embrace such bonds, and that this settled line of authority is conclusive upon my judgment here. *It determines the question that* WHERE THERE IS NO POWER TO TAX FOR ANY PURPOSE *whatever, no direct or indirect tax can be imposed. The authorities cited in the opinion are decisive of this question.* They are relevant to one case and not to the other, because in the one case, there is full power in the Federal Government to tax, the only controversy being whether the tax imposed is direct or indirect; while *in the other, there is no power whatever in the Federal Government, and, therefore, the levy, whether direct or indirect, is beyond the taxing power.*"

From the opinion of Mr. Justice HARLAN (157 U. S., at pp. 653-4), we quote as follows:

"While property, and the gains, profits, and income derived from property, belonging to private corporations and individuals, are subjects of taxation for the purpose of paying the debts and providing for the common defence and the general welfare of the United States, the instrumentalities employed by the States in execution of their powers are not subjects of taxation by the general government, any more than the instrumentalities of the United States are the subjects of taxation by the States; *and any tax imposed directly upon* interest derived from bonds issued by a municipal corporation for public purposes, under the authority of the State whose instrumentality it is, is a burden upon the exercise of the powers of that corporation which only the State creating it may impose. *In such a case it is immaterial to inquire whether the tax is, in its nature or by its operation, a direct or an indirect tax;* for the instrumentalities of the States—among which, as is well settled, are municipal corporations, exercising powers and holding property for the benefit of the public—*are* NOT SUBJECTS OF NATIONAL TAXATION, IN ANY FORM *or for any purpose*, while the property of private corporations and of individuals is subject to taxation by the general government for national

> purposes. So it has been frequently adjudged, and the question is no longer an open one in this Court."

From the opinion of Mr. Justice BROWN on the rehearing, we quote as follows (158 U. S., at 691):

> "It must be admitted, however, that in none of these cases has the question been directly presented as to what are taxes upon land within the meaning of the constitutional provision. Notwithstanding the authorities cited upon this point by the Attorney General" (mentioning them) "to the effect that a tax upon a person with respect to his land, or the profits of his land, is not a tax upon the land itself, *I regard the doctrine as entirely well settled in this court that a tax upon an incident to a prohibited thing is a tax upon the thing itself, and,* IF THERE BE A TOTAL WANT OF POWER TO TAX THE THING, THERE IS AN EQUAL WANT OF POWER TO TAX THE INCIDENT."

Then, after discussing the question whether a tax upon the rent of land is a tax upon the land, he holds that *it is* a tax upon the land, *but that it is an indirect tax*, and says (p. 693):

> "Being of opinion that a tax upon rents is *an indirect tax upon lands*, I am driven to the conclusion that the tax in question is valid."

And then he proceeds to say:

> "The tax upon the income of municipal bonds *falls obviously within the other category, of an indirect tax upon something which Congress has no right to tax at all* and hence is invalid. Here is a question, not of the method of taxation, but of the power to subject the property to taxation in any form. It seems to me that the cases of *Collector* v. *Day*, 11 Wall., 113, holding that it is not competent for Congress to impose a tax upon the salary of a judicial officer of a State; *McCul-*

> *loch* v. *Maryland*, 4 Wheat., 316, holding that a State could not impose a tax upon the operation of the Bank of the United States; and *United States* v. *Railroad Co.*, 17 Wall., 322, holding that a municipal corporation is a portion of the sovereign power of the State, and is not subject to taxation by Congress upon its municipal revenues; *Wisconsin Central Railroad* v. *Price*, 133 U. S., 496, holding that no State has the power to tax the property of the United States within its limits; and *Van Brocklin* v. *Tennessee*, 117 U. S., 151, to the same effect, apply *mutatis mutandis* to the bonds in question, *and the tax upon them must, therefore, be invalid.*"

The only one of the dissenting justices who did not deliver an opinion on this subject was Mr. Justice JACKSON, who, as we all know, was at that time in failing health. He had been unable to attend the original hearing at all. He did attend the rehearing, but soon after died. In the opinion which he delivered on the rehearing, he says at the commencement (158 U. S., at p. 696):

> "I am unable to yield my assent to the judgment of the Court in these cases. My strength has not been equal to the task of preparing a formal dissenting opinion since the decision was agreed upon. *I concur fully in the dissents expressed by Mr. Justice* WHITE *on the former hearing and by the justices who will dissent now*, and will only add a brief outline of my views upon the main questions presented and decided."

He then discusses the main question, but says nothing whatever upon the question as to municipal bonds.

In the opinion of Mr. Chief Justice FULLER on the rehearing (158 U. S., at p. 630), he says:

> "*We have unanimously held in this case that, so far as this law operates on the receipts from municipal bonds, it cannot be sustained*, because it is a *tax on the power of the States*,

> *and on their instrumentalities to borrow money*, and consequently repugnant to the Constitution."

Even the New York courts are fully committed to this doctrine.

In *People ex rel. Leonard* v. *Com. of Taxes*, 90 N. Y., 63, an assessment upon personal property, which consisted entirely of United States bonds, which assessment was based on and limited to the amount of the *premium* on the bonds, was held invalid.

The Court (speaking through EARL, *J.*), after referring to the *Bank Cases*, 2 Black, 620; 2 Wall., 200; 7 *Id.*, 16, 23, and to *Weston* v. *Charleston*, 2 Pet., 449, said (at p. 66):

> "There is nothing in the statutes which confine the exemption from taxation to the par value of the bonds, and there is nothing in the reason upon which such exemption is based which should so confine it. The fact that government bonds are above par is a mere accident. * * *
>
> "*When, therefore, a government loan is put upon the market, it is plain to be seen that it might be materially affected if it were known* that whenever the bonds to be issued should, in the market, from any cause, *happen to be at a premium* when the assessors came to make their assessment, *such premium could be assessed and taxed. Such a tax would affect the value of the bonds and embarrass the Government in effecting a loan in the same way, if not in the same degree, that a tax upon the bonds* eo nomine *would.*
>
> "*Government bonds are frequently taken for permanent investment, as these probably were*, and in such cases the premium is of no importance or advantage. If every holder should at once sell his bonds when at a premium there would be no premium. It is the fact that they are wanted and held for permanent investment that gives them a value above par and produces the premium. *It is the policy of the law that one who invests in Government bonds*

shall receive the principal and interest of the bonds free from any diminution from taxation, and in that way only can effect be given to the principle upon which the exemption rests. When an individual holds his bonds to maturity he gets no advantage from any premium they may have borne at any time; *he receives simply the principal and interest due upon the bonds, and from these would have to be deducted the taxes he may have been obliged to pay upon the premiums, which might, if authorized, consume a large share, if not all the interest.*

" It is clear, therefore, that if the premiums upon such bonds, over which the holder has no control, which he can neither create nor destroy, and which do not really indicate any enhanced value of the bonds, can be taxed, the policy of the law as to the exemption of Government securities from taxation would be greatly violated. *The premium is not something distinct from the bond and cannot exist apart from the bond. It is inherent in it and goes with it.* When the confidence of the public in it is destroyed, that is destroyed. When the bond is transferred, that goes along, and as the bond approaches maturity it vanishes. *The premium is part of the entire value of the bond, and when that is taxed the bond is taxed, or what is equally condemned, the value or a part of the value of the bond is taxed. A conception of the premium upon a bond as a distinct entity for the purpose of taxation is too transcendental and metaphysical for common comprehension and judicial cognizance.*"

All this was so very clear that the Court was forced to disregard a former decision to the contrary, saying:

" *It is said, however, that we have decided,* in the case of *People ex rel. M. F. Ins. Co.* v. *Commissioners* (76 N. Y., 64), *that such premiums may be included in the personal property of an individual for the purpose of taxation.* In that case many important questions were involved and discussed. The one

> as to the taxation upon the premiums which Government bonds bore was of minor importance in that case, and did not, therefore, receive that consideration which it would have received, if it had been the only or the main question involved. *We will not stop now to inquire whether this case can be distinguished from that; but we are constrained now to hold*, upon fuller consideration of the question, the views above expressed, which lead to a reversal of the judgments of the General and Special Terms and the vacation of the assessments complained of."

The doctrine of this case was recently reaffirmed in the courts of New York.

> *People ex rel. Dwight* v. *Platt*, 92 Hun, 349; aff'd, 151 N. Y., 664.

To resume now the question whether a tax of this particular description would in its *practical operation* be a burden upon the borrowing power of the United States and tend to deprive the Government of the ability to borrow on as favorable terms in respect of rate of interest and otherwise, as it might if there were no such tax, we desire to refer to the following further considerations:

In consideration of that question, we have to call attention in the first instance to the circumstance that the borrowing upon the bonds in question was for a very long term. It was to be for thirty years at least, but that was not the necessary limit of the contract of borrowing and the contract in respect of repayment of the loan. There was *not* an obligation of the Government to repay the loan at the end of thirty years. The provision of the Refunding Act of July 14, 1870, in respect of the repayment of the money borrowed was that the bonds should be:

> "*Payable* AT THE PLEASURE *of the United States* AFTER THIRTY YEARS *from the date of their issue*, and bearing interest at the rate of four per cent. per annum."

In conformity with this, is the condition of the bond:

> "This bond is issued in conformity with the provisions of the Act of July 14, 1870, and is *redeemable at the pleasure of the United States after the 1st day of July*, 1907, with interest," &c.

Therefore, when one was about to loan money to the Government by taking and paying for one of these bonds, he perfectly well knew that the obligation of the Government to repay him was *not* to pay it at the expiration of the thirty years, but to pay it at the pleasure of the United States at any time after such expiration; that the loan might be continued for sixty years or ninety years or any longer term that the Government should see fit. The Government had the perfect right to treat the debt as the British Government for a long time did its consols (so called), and to keep it in existence as a debt for say 100 years, or any other time that they might see fit. There was no legal, equitable or moral obligation upon the United States to pay off the principal until they should elect so to do; but they were bound to pay the interest until they should elect to pay the principal. And of course the lender would have before his eyes upon making such a loan the consideration that, so far as respected the principal, it might remain in the hands of the government not only until his death but until after the death of his child or grandchild, and so on indefinitely, and the effect, not merely upon himself, but upon those who were to come after him, of future taxes of this character, which in England they call "death duties"—a term we use in speaking of them for the sake of convenience and brevity. And the presumption must be that he would have considered all those points in determining whether or not he would make the loan, and at what rates of interest or upon what terms otherwise he would consent to make it.

Let us suppose that hereafter the Government

may have occasion to borrow say one hundred million of dollars and that they propose to lenders or would-be lenders or might be lenders, to give them, for the loan, bonds bearing interest at the rate of two per cent. per annum with precisely like terms in respect of repayment as were contained in these so-called thirty-year bonds issued under the Refunding Act of 1870, which might remain in existence not merely for thirty years, but for a hundred years, and so on indefinitely at the pleasure of the Government. As a practical matter, with reference to the *present* four per cent. bonds, it may be assumed that the Government will pay them off as soon as it has the right to do so, because the rate of interest has fallen largely since the bonds were issued. If there should be now a new Refunding loan at the proposed percentage of *two per cent.*, as it proposes, it may be that there will come to be during the currency of such new bonds such a change in the current rate of interest as to bring the rate upon Government bonds of this character to a rate higher than the rate of two per cent., free from all taxes, at which the Government is now preparing to borrow, in which case it might fairly be assumed that, notwithstanding the expiration of the thirty years, the Government would not pay off the bonds and replace them by another borrowing, upon which they would be obliged to pay a materially higher rate of interest. Consequently, a person proposing to invest in such thirty year bonds, subject to the indefinite prolongation of such terms at the mere will of the borrower would have to contemplate the burden of taxes of this character which, not merely during the thirty years, but during an indefinite future period, and in considering whether or not he would make the loan, and if so, on what terms he would consent to make it, he would naturally consider the probable effect upon his family and descendants and other successors in interest of the imposition of such death duties during an indefinite

future period in reducing the actual net return from his investment.

In considering the natural effect upon the mind of the person proposing to invest in United States bonds, of subjection to future taxation of this character, we think there should be borne in mind the following considerations, viz :

The ultimate real lenders, other than such corporations as might choose to take the bonds, would naturally be, in the main, a class of persons putting their money in the loan, of long term and low rate of interest, by way of *permanent investment* for the benefit of themselves and those who were to come after them—disregarding for this purpose the mere temporary holding of bonds by agents of the Government, or bankers and dealers acting as mere intermediaries in placing the loan in the hands of the real lenders. Naturally, such permanent investors would be persons no longer young; they would be persons who had lived long enough and done enough work in the world to have acquired property to sufficient extent to afford to take such long-term investments at extremely low rates of interest. It may fairly be assumed that their average age would be rather over than under fifty, and that they would be tempted to accept this low rate of interest, if they accepted it at all, because of the assumed absolute certainty of the security and its absolute exemption from being in the least degree touched by taxation, while in the hands of themselves or in the hands of their families, for whose benefit, rather than for their own, they made the investment - making it in substance for all who should come after them. We all know that, in very large measure, the labor and toil with which men seek to acquire property and deal with it, is usually, especially in the later period of life, more for the benefit of their families than of themselves.

Of such a body of men, each one of them would certainly know that he was liable at any moment

to be called away from life, and they would all understand that in ordinary course, long before the thirty years had ended, more than one-half of them would have gone to their graves. And the foregoing considerations are none the less applicable in those cases, in which the bonds are sold in large blocks or quantities to bankers or large dealers in such securities, who buy, not to hold for themselves as investors, but with intent to sell again, and whose willingness thus to buy, and the price they can afford to pay, are dependent upon their ability to find purchasers for actual investment, and the price obtainable from such investors.

As well in case of the large sales in blocks to bankers and dealers as in the case of employing such parties to sell directly as agents of the Government, in consideration of a commission paid to them, the position of such bankers and dealers is, practically, merely intermediary between the Government and the investor who buys for permanent holding, who is in real substance the original lender.

Now, instead of considering the question with reference to the supposed action of an individual contemplating an investment of his money in such proposed new two per cent. bonds, payable at the Government option after thirty years, let us consider with reference to the taking of the entire loan *en masse* by an aggregation of individuals, acting through a common agent or representative in negotiating the terms of the loan.

Let us suppose that the Government, desiring to borrow a hundred millions which it needs, does not undertake to fix precisely the rate of interest or other terms and conditions in detail of the loan, but leaves it to the Secretary of the Treasury to borrow the money on what he in his discretion shall regard as the most favorable terms on which he can obtain it; that then the loan, being as it were in the market, there is formed what in these days is called a syndicate with a view to taking

the whole loan and dividing it subsequently among themselves; and that there would then follow, as would be quite natural, a negotiation between the Secretary and the representative of the syndicate for fixing the terms of the proposed loan and the taking of it by the syndicate, if the terms should be made satisfactory to them; that in the course of such negotiation the parties had come to the point of agreement that in the then condition of the money market a rate of two per cent. would be fair and satisfactory to the syndicate, provided the bonds could be or could have been made to carry an absolutely complete exemption of the holder from taxation in any and every possible shape, whether direct or indirect, which had been until recently considered as inhering in respect of bonds of this character, but that, it having recently been decided that exemption from taxation, by States, by means of death duties of this character, was not and could not be secured to the bondholders by any action of the Federal Government, and that consequently, in order that the syndicate might take the loan, there must be made to them an allowance in some shape for the probable effect upon themselves and their successors in interest of these death duties, in discussing the question with reference to such an allowance either by raising the rate of interest on the bonds or making a discount from par upon the original taking of them to such extent as, by estimate, would in effect practically make good the amount of the subsequent tax burden during the running of the loan to the bondholders at the time being by reason of subjection to these death duties, the parties should find difficulty in agreeing upon the estimate, the representative of the syndicate claiming a larger allowance on this account than the Secretary deemed a reasonable measure of the probable extent of this burden *in futuro*, and that, for accommodating this difference of view as to the amount of the allowance in either of the modes proposed, the representative of the

syndicate should propose to the Secretary that, instead of making such allowance by estimate for compensation to the bondholders for this inevitable future detriment consequent upon the death duties, it should be so arranged that the *Government* should bear the precise, actual amount of such burden as should come upon the bondholders *in futuro* by means of a stipulation in the bonds, and, if need be, in a formal written contract otherwise, that whenever a bondholder should be subjected to the burden of one of these death duties he should be entitled at the next quarterly interest day, after he should have made payment of it, to have it refunded to him by the Government upon producing in some proper agreed form evidence of his having been subjected to and having paid the death duty. That this would be entirely fair to both parties to the negotiation would be too plain for dispute, and the only objection that could reasonably be made to it would seem to be be that it would involve a considerable amount of trouble in the details of its working, as to which it might well be said, in answer, that the trouble would not be so very great, inasmuch as it would not be likely to occur many times in respect of any one bond, and that upon the whole it probably would be a less burden in the way of trouble than the Government has been, almost from the foundation of the system of duties upon imports, accustomed to sustain, under the practice of refunding under the name of debenture, or drawback, the amount of duties which shall have been paid upon imported goods upon a re-export of them, less a small percentage of the duty retained by the Government in the way of compensation for the trouble it will have had in respect of the original importation and the duties on it, and the cautionary forms which would have to be observed with relation to the debentures, and in respect of ascertaining satisfactorily that the goods exported have been actually landed in a foreign country, for which it

has been customary to require what has been called a landing certificate.

We take it that this whole subject of debentures, or drawbacks, on the export of imported goods that have paid duty is familiar enough to the Court; and that, if any citation of statutes in regard to it is in any wise useful, they may be readily referred to.

We may note that this system of debenture or refund upon export of goods, on which import duty had been originally paid, has been by statute carried to the extent of a refund of duty in case of the export of *product* of imported goods, *e. g.*, on the export of oil cake, the product of imported linseed from which had been manufactured linseed oil, leaving the residuum called oil cake.

In the case of *Campbell* v. *United States*, 107 U. S., 407, will be found a reported case involving the question whether the right of the exporter of oil cake, thus produced from imported linseed, to have his refund, could be defeated by the neglect of the officials of the Government to provide suitable working machinery for ascertaining the particulars upon which the right to the refund or debenture rested, in which case this Court, reversing the decision of the Court of Claims, held that the right of the exporter could not be thus defeated.

And, with these explanations, we now proceed to say that, in the case supposed, of negotiation with a syndicate, the allowance to the takers of the bonds for the prejudicial effect of such death duties imposed by a State would manifestly be entirely fair and reasonable, assuming two per cent. interest to be the fair rate for the taking of the loan upon the basis of absolute exemption from all taxes and duties whatsoever. And inasmuch as, supposing the right of the State to exact such duties should have been adjudged by this Court to exist, there would be no possible way of the Governments' escaping from the burden of making allowance for it to bondholders taking the two per cent. loan, in such shape as the bondholders would consent to accept,

and if the Government should refuse to make such allowance, the inevitable result would be that the syndicate negotiating for the loan would absolutely refuse to take it at two per cent. unless compensation for this burden were in some satisfactory shape made to them, and so would it be with any and all persons of ordinary intelligence proposing to negotiate for the loan, if this burden should be, as manifestly it would be, a matter of very serious importance in amount; and in effect the Government would be absolutely compelled to make an allowance of this kind or go without the money.

Practically, if the Government needed the money, it could not get it at all without making in some shape this allowance, either by varying the rate of interest or in some other manner, and it is too clear for reasonable dispute, that, if the Government should adopt either of the two forms of making this compensation to the bondholders above spoken of—namely, either, by estimate, fixing and allowing for the amount of the burden at the time of making the loan, or by an executory arrangement for the bearing of the burden of the death duties by the Government from time to time as they should be imposed—the inevitable effect would be, that the Government in the exercise of its borrowing power under the Constitution would be, despite all efforts to the contrary, subjected to the burden of paying, or allowing for, these death duties exacted by the State.

And thus we find that, if taxation of the particular character now in question were by the judgment of this Court permitted to the States, the net eventual result, practically accomplished, would be that, notwithstanding the provisions of the Constitution of the United States to the contrary, *the State would have imposed this tax and collected it, and the United States would have borne and practically paid it* by means of making allowance of the amount

of it to the lenders upon adjusting the terms of the loan, *and so it would have come to be the law of this country that the States can tax the Nation.*

This Court pointed out, in *Dobbins* v. *Com. of Erie Co.*, 16 Pet., 435, 448, that the State tax upon the compensation of Federal officers, there in question, if sustained, would *eventually have to be paid by the United States*, by an increase or graduation of the compensation in accordance with the amount of the tax. There, as must be the case here, the tax was, for that reason, among others, condemned.

We conclude this point by the statement of a proposition which we should have stated at its commencement, if it had not seemed better, with reference to its complete understanding, to make certain preliminary explanations; which proposition is as follows, that is to say:

It goes without saying that the question at issue here must be disposed of as it would be if there had been *a provision in the Constitution, in express terms, precisely corresponding with the legal effect of the general clauses* bearing upon the subject which are found in the Constitution as it now is, *as those clauses have been conclusively construed*, and given effect to by the adjudications of this Court made seventy years ago, and thenceforth steadily adhered to, and the controlling authority of which adjudications cannot be and is not disputed.

And we submit that it is equally clear that if the Constitution had provided in so many words that "the States shall have no power to impose any tax or other burden which would have the effect to *prevent or hinder the government of the United States from borrowing such amounts of money as it may require for its purposes on terms as beneficial and favorable to itself in all respects as it could do if no such tax were imposed by the State*," it would not at all go beyond the legal effect of the existing general clauses of the Constitution bearing upon the question.

Supposing the United States Constitution did contain such an express clause as we have above suggested, would it not be unquestionable and manifest at a glance, that all the propositions on which our adversaries substantially rely for supporting this tax, *e. g.*, that "the tax is not upon the bonds," or that it is "a tax upon the privilege and not upon the property," and all such like propositions, would necessarily have to be regarded as so plainly irrelevant that it would be idle to waste time in discussing them?

Unquestionably, in such a case the only question would be, whether the State tax challenged was a tax required to be paid by the bondholder at the time being, because of his being such bondholder, and which he would not be required to pay if he were not such bondholder—the burden of which tax, as we have shown, would naturally have fallen practically upon the United States in the adjustment, between the United States and the original lender, of the terms of the loan, in respect of interest and otherwise—in which case, *all questions as to the nature or name of the tax, or the ground or reason leading the State to impose it, or the basis of the right of the State to impose it, would be entirely immaterial.*

In the view we take of this case, as to the soundness of which we cannot ourselves entertain a doubt, our argument might well end here. But as the decision of the highest court of New York is unquestionably against us, and as there are many other decisions, in various State courts, adverse to the view which we take and have thus far endeavored to express, we feel bound to continue the discussion in detail of the various propositions asserted by our adversaries.

With reference to the remarks made at sundry places in this brief (and which were likewise made in our brief on behalf of intervenors in the case of *Sherman* vs. *The United States*, and *Murdock* v. *Ward*, Nos. 458 and 459, relating to the claim of

the United States to impose death duties of this character, under its Act of 1898, upon or in respect of United States bonds having the exemption from taxation declared by the Refunding Act of July 14, 1870), in which we have referred to the onerous character of these death duties, and especially the application to them of the principle of graduation with reference to the amount involved, we desire to say, that none of such remarks (as the Solicitor General seems to assume in those cases, in his answer to our brief on behalf of intervenors, and as we suppose might be assumed in like manner by the counsel adverse to us in this case), were made or intended by way of complaint or railing against those statutes. We do not think we should have any right to take up the time of the Court, nor should we even desire to waste our own time, in making such remarks for any such purpose. What we have said in this respect has been with the very legitimate practical purpose of showing clearly the magnitude of the burden imposed upon United States bonds by the imposition of death duties of this character, which have heretofore been imposed, or which may probably or possibly be imposed hereafter, and in order to make it clear and certain, if such heavy burdens are by the judgment of the Court allowed to be imposed, that persons who may hereafter make loans to the Government by taking Government bonds will, beyond doubt or question, take into account such impending heavy pecuniary burdens *in futuro*, when considering the question of making loans to the Government, or the terms upon which they will consent to make them.

Third Point.

We have now to present the question at issue under another aspect. BY THE VERY TERMS OF THE CONTRACT IN THE BOND, THE UNITED STATES HAS AGREED THAT THE HOLDER (HERE THE TESTATOR, PLUMMER), MAY TRANSFER THE OBLIGATION, EITHER WHILE LIVING OR AT DEATH, *and that it will pay the amount of the debt to the transferree, appointee, or donee thus selected. This act of transfer or assignment is, therefore, effectually protected from taxation by the States, because it involves the exercise of authority under the paramount ... tract of the Federal Government, executed in virtue of its borrowing power.*

The tax in question has been assessed on the transfer, or devolution, of title to $40,000 of United States four per cent. bonds, of 1907, under the will of Joseph Plummer, deceased, to Harry Plummer, as executor, &c., upon a trust for the benefit of the testator's daughter, Ella Plummer Brown, for her life, with disposition over upon her death. The tax is assessed upon the appraised value of the beneficial interest of Ella Plummer Brown, the daughter, under this transfer.

On the preceding pages of this brief will be found a copy of the form of these bonds, and a printed direction on the back of them, providing for transfers by the executors and administrators of the bondholder, which has been customarily placed upon all the bonds issued by the United States for more than fifty years, that is to say, since 1847, and this may be regarded as a practical construction by the Government of the obligation of the bonds and the mode of disposition of them subsequent to the death of the bondholder.

Upon reference to the form of the bond, it will be

seen that it runs to the bondholder named in it, "*or assigns*," and the bond states upon its face that it is "*transferable* on the books of this office," *i. e.*, the books of the Treasury Department.

We suppose it to be clear law that the State can not lawfully impose any tax, or other burden by way of tax, upon this contract of the United States or any of its incidents, and that there exists this disability to tax any transfer or devolution of the title to the bond *made under and in pursuance of its terms.*

The language of the bond, in respect of changes of title to it, is extremely brief. The words used are merely "*or assigns*," and "*transferable* on the books" of the Treasury, but it is, of course, entirely appropriate to ascertain in any proper manner, and give proper effect to, this brief language; in other words, this short form is to be construed, and its legal effect ascertained, and the question of the right to impose taxation upon, or in respect of, it, is to be disposed of, precisely as it would be if the legal effect of the words employed, properly ascertained, had been set forth at large upon the face of the bond.

Primarily, we think it would be unreasonable to assert that this bond contains any less provision for the legal devolution of the title to the debt of the Government, which the bond represents, than would be the case with an ordinary bond, executed by an individual, in the customary form now existing, and which has existed and been in use, we may almost say, from time out of mind. All bonds have always provided for payment to the obligee, "*or his executors, administrators or assigns.*"

We take the form of this ordinary bond now in use from a blank form procured from the law-stationers, which any lawyer in the State of New York would say, and which this Court must judicially know, has been in use ever since the time of one's recollection. This printed form, leaving the blanks unfilled, is as follows:

"KNOW ALL MEN BY THESE PRESENTS that ..... held and firmly bound unto ..... in the sum of ..... lawful money of the United States to be paid to the said ..... *executors, administrators or assigns*, for which payment well and truly to be made.....bind.....heirs, executors and administrators.....firmly by these presents. Sealed with.....seal. Dated the .....day of.....one thousand eight hundred and.....

"The condition of the above obligation is such that if the above bounden,.....heirs, executors or administrators shall well and truly pay or cause to be paid unto the above named.....*executors, administrators or assigns* the just and full sum of..... on the.....day of.....which will be in the year one thousand eight hundred and .....and the interest thereon to be computed from.....at and after the rate of.....per cent. per annum and to be paid .....then the above obligation to be void, otherwise to remain in full force and virtue."

We find in our edition of Blackstone's Commentaries, *Chitty's Blackstone* (Am. Ed. of 1832), in the *appendix* at the end of the first volume, embracing books 1 and 2, a form of a bond of this character, as in use in and before Blackstone's time. We give this form from that appendix as follows:

"No. 3. *An obligation, or bond, with condition for the payment of money.*

"KNOW ALL MEN BY THESE PRESENTS, that I, DAVID EDWARDS, of Lincoln's Inn, in the County of Middlesex, esquire am held and firmly bound to ABRAHAM BARKER, of Dale Hall, in the County of Norfolk, esquire in ten thousand pounds, of lawful money of Great Britain, to be paid to the said Abraham Barker, *or his certain attorney, executors, administrators, or assigns;* for which payment well and truly to be made, I bind myself, my heirs, executors and administrators, firmly by these presents, sealed with my seal. Dated the fourth day of September, in the twenty-first year of the reign of

> our Sovereign Lord, George the Second by the grace of God, King of Great Britain, France and Ireland, defender of the faith, and so forth, and in the year of our Lord, *one thousand seven hundred and forty-seven.*
>
> "The condition of this obligation is such that if the above bounden David Edwards, his heirs, executors or administrators do and shall well and truly pay or cause to be paid unto the above named Abraham Barker, *his executors, administrators or assigns* the full sum of five thousand pounds of lawful British money with lawful interest for the same on the fourth day of March next ensuing the date of the above written obligation, then this obligation shall be void and of none-effect, or else shall be and remain in full force and virtue. David Edwards (L. S.) Sealed and delivered, being first duly stamped, in the presence of George Carter. William Browne."

We thus see that our present form follows quite literally, for all substantial purposes and for every purpose for which we have occasion to refer to it, the form in use more than one hundred and fifty years ago. We presume it had existed for several centuries before that, but the fact that it was in existence in *1747* is all-sufficient for our purpose.

This provision for payment to "*assigns*" has always been held to include *devisees, legatees and executors or administrators, and every species of assignee, whether voluntary or by act of the law.*

In *Spencer's Case*, 5 Rep., 16, it was held, in Lord COKE's time, that the word "assignees," or "assignee," extended to the "assignee of the assignee," and, proceeding, the Court further held:

> "*So of the executors of the assignee of the assignee; so of the assignees of the executors or administrators of every assignee, for all are comprised within this word (assignees) for the same right which was in the testator, or intestate, shall go to his executors or administrators;* as if a man makes a warranty to one, his heirs and assigns, the *assignee of the assignee* shall vouch, and so

> shall the *heirs of the assignee; the same law of the assignee of the heirs of the feoffee, and of every assignee.*"

The Court of Queen's Bench has said with great emphasis:

> "The word '*assigns*' is a term of well known signification, *comprehending all those who take, either immediately or remotely, from or under the assignor by conveyance, devise, descent, or act of law.*"
>
> *Bailey* v. *De Crespigny*, L. R., 4 Q. B., 180, at p. 186; s. c., 10 B. & S., 1.

In *Cumberland* v. *Graves*, 7 N. Y., 305, 312, the Court held that--

> "Under this word '*assigns*' a *devisee* is included. The word 'assigns' includes *the assignee of an assignee in perpetuaem, the heir of an assignee and the assignee of an heir.*

So also it was held in *Titley* v. *Wolstenholme*, 7 Beav., 425, that the *devisee* of a trustee is an "*assign*," and entitled to execute a trust limited to the trustee and "his assigns."

The term "assigns" has been held to include "legal representatives," and the term "legal representatives" has been held to include "assigns."

> *Hamilton* v. *Kingsbury*, 15 Blatchf., 64, 69.
>
> *N. Y. Mut. Life Ins. Co.* v. *Armstrong*, 117 U. S., 591, at page 597.

In the case last cited this Court said:

> "The term 'legal representatives' is not necessarily restricted to the personal representatives of one deceased, but is sufficiently broad to cover all persons, who, with respect to his property, stand in his place and represent his interests, whether transferred to them by his act or by operation of law. *It may, in this case, include assigns as well as executors and administrators.*"

In *Douglass* v. *Hennessy*, 15 R. I., 272, at pp. 274–275, the Court held that the word "assign," in the condition of a bond, conditioned on the transfer of certain real estate to the obligee or "*her assigns*—"

> "*may be construed to extend to executors and administrators, the executor or administrator of an obligee or covenantee being his assign or assignee by operation of law.*"

So it has been held that the foreign administrator of a mortgagee "*is an assign of his intestate by act of law*," and may, as such, exercise a power of sale in the mortgage.

Thurber v. *Carpenter*, 18 R. I., 782, 783.

Upon the basis of what is above said, we think we may properly say that the legal effect of the United States bond in question was to pay to Joseph Plummer, the testator, so long as he should live (unless he should otherwise dispose of it), the interest on this bond and the principal, in case it should fall due and be paid off, and, in case of the death of Joseph Plummer without having otherwise transferred the obligation or indebtedness, to make the stipulated payment of interest and principal, when they should be due and payable, to such person or persons as he should lawfully direct or appoint to receive the same, whether by will, gift, deed or otherwise.

Under the provisions of the so called Transfer Tax Law of the State of New York, under which the tax in dispute is claimed to have been imposed, it makes no difference, in respect of liability for the tax (supposing the tax valid in law), whether the transfer or devolution of title be effected by will or by gift or deed made by the intestate in his lifetime, if the gift or deed be made in contemplation of the death of the grantor or donor, or *intended to take effect in possession or enjoyment at or after his*

death. The words of the statute in respect of these two modes of transfer are as follows:

(1.) When the transfer is *by will or by the intestate laws* of this State from any person dying seized or possessed of the property while a resident of the State.

(3.) When the transfer is of property made by a resident (or by a non-resident when such non-resident's property is within the State) *by deed, grant, bargain, sale or gift* made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death.

N. Y. Tax Law, § 220.

The substantial effect of the will of Mr. Plummer was, to leave the legal title to these United States bonds to pass to his executor temporarily for the purpose of administration (*i. e.*, subject to be used in due course of administration if required for the payments of debts, &c., &c.), but when no longer required for such temporary purpose, the bonds are to go to Henry Plummer upon the trust for the benefit of Ella Plummer Brown, the life beneficiary, &c., and we submit, that, in respect of the tax, *as it makes no difference* (if it be valid), *whether the transfer be made by will or by gift or trust deed, so it makes no difference in respect of the question of the validity or invalidity of the tax* whether the transfer be made by one method or the other. Plummer, the owner of the bonds, had complete option to make the transfer in such one of these methods as he should see fit; and we submit that in sense, in reason, or in law, it can make no difference, in the rights of the person or persons deriving lawful right or title, either legal or equitable or beneficial, to the bonds in question, in respect of the exemption from Federal or State taxation, whether the mode of transfer adopted by

Plummer was either one of these two methods in respect to which he had the option.

If, in case the transfer were made by *gift or deed*, made in contemplation of Plummer's death and intended to take effect in possession or enjoyment at and after his death, the trustee to whom the bonds were transferred and the testator's daughter, the beneficiary of the trust, would be, in virtue of the Constitution of the United States, exempted from any taxation in respect of these bonds, they are *equally* so exempted in case of the transfer being made by *will*. The substance of the matter was, that Plummer had the right, in pursuance of the terms of the obligation of the Government given to him as representative of the debt, to appoint and direct to whom the principal and interest should be paid subsequently to his death; and, whether he executed that right of appointment in the one way or the other, supposing he did so lawfully, the devolution of the title to the bonds thus made is by the Constitution of the United States effectually protected from taxation, and by the terms of the bond there is in legal effect, *as part of the contract*, an obligation of the United States to pay the interest and the principal, if and when it shall be payable, to Plummer's *appointee*, andso on to the representatives and assigns of such appointee, indefinitely.

Fourth Point.

As to the COMMON LAW RIGHT IN NEW YORK TO DISPOSE OF PERSONAL PROPERTY BY WILL; *the incidents and results of that right; the effect of alterations, if any, in the right by subsequent statutes; and—there never having been such alterations—as to the existing right at Plummer's death, a right not*

in any sense a special privilege, but merely a COMMON RIGHT.

We come now to consider certain propositions asserted by our adversaries, which, if we correctly understand them, are substantially to the effect that the right to dispose of personal property by will is derived purely by grant from the State, under statutes of the State; that, in granting or permitting such disposition, the State *confers upon* the testator the right thus to dispose of his property, and upon the recipients of the property, taking by the terms of the will, a substantial right or privilege thus to receive it; that the State may, at its own mere will, withhold or take away such assumed rights or privileges; and that having such right, it may, at its will, *take to itself as its own*, to such extent and in such manner as it shall see fit, the whole, or such portion as it shall choose, of the property which would be distributable by will, if the permission thus to dispose of it were granted, or were not taken away, by the State.

Our view is, that this proposition *rests upon a fallacy and is entirely unsound and untrue*, and, moreover, that if it were *conceded to be entirely correct, it would not at all help the contention of our adversaries, because of the grounds and reasons* which we have set forth in the preceding Second Point and the succeeding Eighth Point, which seem to us entirely conclusive upon the question.

But notwithstanding this latter view, we think it appropriate to discuss with care and some elaboration the proposition of our adversaries just above referred to, and accordingly we proceed to assert our view of this subject as follows:

The right to dispose of personal property by will, as existing in the State of New York when Joseph Plummer, by his will, disposed of the personal property, in respect of which the tax in question was imposed, was not, is not now, and never was,

a right conferred by statute of the State of New York. It is *a right existing at common law*, and, until the New York Revised Statutes of 1830, it rested, in New York, *upon the common law and upon nothing else.* The Revised Statutes of 1830 *did not confer* the right of disposing of personal property by will, but merely *imposed certain regulations* in respect of it, *not by way of enlarging*, but to a certain extent *abridging or qualifying* the common law right—not by varying in any respect its substance, but *by requiring certain additional formalities*—and if this provision of the Revised Statutes of 1830 were repealed to-day, the common-law right of disposition of personal property by will would remain in full force, just as it was in that State up to the year 1830, and would rest upon the common law and upon nothing else..

Referring now to Blackstone's Commentaries, we quote as follows from Chitty's Blackstone, American Ed. of 1832 (of which there was an edition, with additional notes and references to American cases by a member of the New York Bar, published in Philadelphia by Lippincott, Grambo & Co. in 1835—our references however, being to the *marginal or original paging*).

In Chapter 32, the title of which is "Of Title by Testament and Administration," which is found in book 2, in the latter part of Vol. 1 of Chitty's Edition, pp. 490, *et seq.*, and in Chapter 23, relating to "Devises," Blackstone treats the subject of dispositions of personal property by bequest and dispositions of real property by devise. In this Chapter 32, page 491, relating to wills of personalty, Blackstone, after a statement of some length relating to the laws and usages, in this respect, among the Hebrews, the Greeks and the Romans, &c., says:

> "*With us in England, this power of bequeathing is coeval with the first rudiments of the law; for we have no traces or memorials of any time when it did not exist.* Mention is made of *intestacy*, in the old law before the

> conquest, as being *merely accidental;* and the distribution of the intestate's estate, after payment of the lord's heriot, is then *directed to go according to the established law.*"

Then follows a quotation from the Laws of Canute on this subject. Then he refers to the fact that by the common law, as it stood in the reign of Henry II.—

> "a man's goods were to be divided into three equal parts; of which *one went to his heirs or lineal descendants, another to his wife, and the third was at his own disposal;* or, if he died without a wife, he might then dispose of one moiety, and the other went to his children; and so *e converso* if he had no children, the wife was entitled to one moiety and he might bequeath the other; but *if he died without either wife or issue, the whole was at his own disposal.* The shares of the wife and children were called their reasonable parts; and the writ *de rationabili parte bonorum* was given to recover them."

And then Blackstone proceeds to say:

> "This continued to be the law of the land at the time of *magna charta, which provides* that the King's debts shall first of all be levied, and then the residue of the goods *shall go to the executor to perform the will* of the deceased; and, if nothing be owing to the crown, *omnia catalla cedant defuncto; salvis uxori ipsius et pueris suis rationabilibus partibus suis.*"

That is to say, when rendered into English, "all the goods may be disposed of by the deceased, saving the reasonable parts of the wife and children."

We have thought it well in this connection to refer to Magna Charta, and we find a copy of it with the Latin on one page and the translation into English on the page, facing it, edited by Richard Thomson, and known as Thomson's Magna Charta.

It appears to have been published in London in 1829. We quote from the English translation of Magna Charta in this book, at pages 77 and 79, Article XXVI. as follows:

> "If any one holding of us a lay fee dies and the Sheriff or our Bailiff shall show our Letters Patent of summons concerning the debt which the defunct owed to us, it shall be lawful for the Sheriff or our Bailiff to attach and register the chattels of the defunct found on that lay fee, to the amount of that debt by the view of lawful men so that nothing shall be removed from thence until our debt be paid to us, *and the rest shall be left to the executors to fulfil the will of the defunct;* and if nothing be owing to us by him *all the chattels shall fall to the defunct saving to his wife and children their reasonable shares.*
>
> "Article XXVII. *If any free man shall die intestate his chattels shall be distributed by the hand of his nearest relations and friends* by the view of the Church, saving to every one the debts which the defunct owed."

We thus find this right of disposition of personal property by will recognized as the inherent right of Englishmen and of so great importance as to be confirmed to them by the Great Charter, which is so often referred to as assuring the property, and the rights and privileges, of the people of England.

We find in this thirty-second chapter of Blackstone a discussion at some considerable length in relation to this right or supposed right of the wife and children of a deceased person to their reasonable shares of his goods and chattels. This right, whatever it was, seems to have been a very ancient right, and there appears to have been considerable discussion among writers as to whether it was a *general right under the law, or a right existing by custom in certain particular localities.* However that may be, it appears that this right of the wife and children, as qualifying the right of testamentary

disposition by the husband and father, gradually *grew out of use.* On page 493, Blackstone says:

> "To which we may add, that, whatever may have been the custom of later years in many parts of the Kingdom, or however it was introduced in derogation of the old common law, the ancient method continued in use in the Province of York, the principality of Wales, and in the City of London till very modern times; when, in order to favour the power of bequeathing, and to reduce the whole Kingdom to the same standard, three statutes have been provided; the one 4 & 5 W. & M. c. 2, explained by 2 & 3 Ann. c. 5 for the province of York; another 7 & 8 W. III, c. 38, for Wales; and a third, 11 Geo. I, c. 18 for London; whereby it is enacted that persons within those districts, and liable to those customs may (if they think proper) *dispose of all their personal estates by Will;* and the claims of the widow, children and other relations to the contrary are totally barred."

As, under this ancient restriction or qualification, all the power to bequeath personal property by will was in one sense qualified, it may properly be observed that whether this right of the children was general in England, or limited to particular districts, and whether it was a right founded upon custom merely, or upon positive law, *there was none the less the general right to dispose of one's property by will.* In case one had never had a wife or child, or had lost them all by death, unquestionably this right of disposition by will was absolute and complete, *extending to all the property* of the testator. These qualifications, such as they were, were merely conditional and perhaps temporary. Whenever they should be removed by the death of the wife and children, or by cessation of their rights, whether founded upon custom or otherwise, the power, in respect of all the property, was as complete thenceforth as if the restriction had never existed, and, considering the

general question, whether there was or was not at common law, the right to dispose of one's property by will, the existence of a restriction of this character, sometimes applicable and sometimes not, and which, if once existing, might wholly cease before the death of the testator, cannot in any just sense be considered as rendering the general right of disposition of personalty by will a partial right merely, any more than could any other mere incumbrance upon the testator's property be so considered, *nor any more than can the existence of the right of dower, which is an absolute and paramount right*, be considered in any just sense (with reference to any such purpose as the *nature of the right* which we are now examining) *a disparagement of the right, in general, to dispose of lands by devise.*

Blackstone says, in the passage which we have quoted, that in England—

> "*this power of bequeathing is coeval with the first rudiments of the law, for we have no traces or memorials of any time when it did not exist.*"

We have not undertaken to make any investigation as to the origin of this right, which investigation, from what Blackstone says, would seem to be hopeless of result; but we find in Hume's History of England, volume 1, page 61, in the edition published by Little, Brown & Co., Boston, 1854), that King Ethelwood, the grandfather of the celebrated King Alfred, upon his death in the year 857, left a will, and it is also stated by Hume (Vol. 1, p. 79) that King Alfred, who died in the year 900, left a will, embodying the sentiment "that it was just the English should forever remain as free as their own thoughts," and in Chapter 33, page 424 of the second book of Blackstone, latter part of the first volume of Chitty's Edition, in speaking of the confirmation of Magna Charta granted by Henry III., the son of King John, it is said:

> "With respect to private rights, *it established the testamentary power of the subject* over part of his personal estate, the rest being distributed among his wife and children; it laid down the law of dower, as it hath continued ever since: and it prohibited the appeals of women, unless for the death of their husbands * * * and lastly (which alone would have merited the title that it bears of the *great* Charter), it protected every individual of the nation in the *free enjoyment of his life, his liberty and his property* unless declared to be forfeited by the judgment of his peers, or the law of the land."

Having given the several quotations from Blackstone in relation to the power of a testator to give his personal estate, we desire now to refer to certain statements of Blackstone in respect of the *right of a legatee to receive* a bequest.

On page 512 of the second book, latter part of first volume of Chitty's Edition, Blackstone says:

> "A legacy is a bequest, or gift, of goods and chattels by testament; and *the person to whom it was given is styled the legatee; which every person is capable of being, unless particularly disabled* by the common law or statutes, as traitors, papists and some others."

In respect to this disability of papists, we find a a note at the bottom of the page in these words.

> "This ground of disability no longer disgraces the statute book."

Blackstone then says:

> "This bequest transfers an inchoate property to the legatee; but the legacy is not perfect without the assent of the executor; for if I have a general or pecuniary legacy of £100, or a specific one of a piece of place, I cannot in either case take it without the consent of the executor. For in him all the chattels are vested, and it is his business first of all to see whether there is a sufficient fund left to pay

> the debts of the testator; the rule of equity being that a man must be just before he is permitted to be generous; or, as Bracton expresses the sense of our ancient law '*de bonis defuncti primo deducenda sunt ea quae sunt necessitatis, et postea quae sunt utilitatis, et ultimo quae sunt voluntatis.*' "

On this subject much has been written, but Blackstone's statements really cover all that is known or can be said, The matter received elaborate discussion at this bar, in the briefs submitted to this Court in *Magoun* v. *Ill. Trust and Savings Bank*, 170 U. S., 283, and no further references to text writers is needful here.

Then we find that the rights and privileges of testators and legatees in respect of disposing of personal property by will and receiving the benefit of such disposition, as that existed in the common law of England, were part of the common law of the Colony of New York so long as it remained a colony.

> "It was *imported by our colonial ancestors*, as far as it was applicable, and was sanctioned by royal charters and colonial statutes," and was "*recognized and adopted as one entire system by the Constitutions* of Massachusetts, New York, New Jersey and Maryland."
>
> 1 Kent's Com., 472-473.

When the first Constitution of the State of New York was framed by our ancestors in the year 1777, they assumed that from the time of the War of the Revolution the independence of this State had become an established fact, and they saw fit to fix as the date of that establishment the date of the battle of Lexington. Whether there was sufficient foundation in fact for that assumption, we do not deem it needful to consider, but that was their version of the matter.

Now we refer to the first Constitution of the State of New York, which appears to have been adopted by the convention sitting at Kingston on

the 20th of April, 1777, in which we find, in Article XXXV., the following declaration and provision:

> "And this convention doth further, in the name and by the authority of the good people of this State, ordain, determine and declare that *such parts of the common law of England and of the Statute law of England and Great Britain* and of the acts of the Legislature of the Colony of New York as together did form the law of the said colony on the 19th day of April, in the year of our Lord one thousand seven hundred and seventy-five, *shall be and continue the law of this State, subject to such alterations and provisions as the Legislature of this State shall, from time to time, make concerning the same.* That such of the said acts as are temporary shall expire at the times limited for their duration respectively. That all such parts of the said common law, and all such of the said statutes and acts aforesaid, or parts thereof, as may be construed to establish or maintain any particular denomination of christians or their ministers, or concern the allegiance heretofore yielded to, and the supremacy, sovereignty, government, or prerogatives, claimed or exercised by the king of Great Britain or his predecessors, over the colony of New York and its inhabitants, or are repugnant to this Constitution, be and they hereby are, abrogated and rejected. And this convention doth further ordain that the resolves or resolutions of the Congresses of the colony of New York and of the Convention of the State of New York now in force and not repugnant to the Government established by this Constitution shall be considered as making part of the laws of this State; subject, nevertheless, to such alterations and provisions as the Legislature of this State may, from time to time, make concerning the same."

This was the only Constitution the State of New York had, prior to the Constitution of 1821. Certain amendments to this first Constitution were made in convention of delegates sitting at Albany, October 27, 1801, but none of these amendments have any

relation whatever to the subject under consideration.

The provision of the Constitution of 1821 in relation to this subject of the old common law is contained in Article VII., Section 13, and is as follows:

> "*Such parts of the common law*, and of the acts of the Legislature of the Colony of New York as together did form the law of the said Colony on the nineteenth day of April, one thousand seven hundred and seventy-five, and the resolutions of the Congress of the said Colony and of the Convention of the State of New York in force on the twentieth day of April, one thousand seven hundred and seventy seven, which have not since expired or been repealed or altered; and such acts of the Legislature of this State as are now in force *shall be and continue the law of this State subject to such alterations as the Legislature shall make concerning the same.* But all such parts of the common law and such of the said acts or parts thereof as are repugnant to this Constitution are hereby abrogated."

The provision of the Constitution of November 3, 1846, as contained in Article I., Section 17, is substantially a repetition of the provision of the Constitution of 1821, above quoted, with an addendum providing for the appointment of commissioners whose duty it shall be to reduce into a written and systematic code the whole body of the law of this State or so much and such parts thereof as the said Commissioners shall deem practicable and expedient (and certain other provisions in regard to the duties and functions of these Commissioners, which are not material to quote).

The provision of the present Constitution of 1894, in relation to this subject, is contained in Article I., Section 16, and it is substantially a repetition of the provision of the Constitution of 1846, dropping out the provision in relation to the projected codification of the law.

The only statutory provision in New York anterior to the Revised Statutes of 1830 relating to the making of wills of personal property, which our researches have enabled us to discover, is the one which we will now quote, and we feel quite confident that there is or was none other. We quote from Chapter XLVII. of the Laws of 1787, entitled "An Act to reduce the laws concerning wills into one Statute," passed March 3, 1787, this quotation being from Volume 2 of an edition of the laws of the State of New York, passed at the sessions of the Legislature held in the years 1785, 1786, 1787 and 1788 inclusive, being the eighth, ninth, tenth and eleventh sessions, republished by the Secretary of State, pursuant to Chapter 341 of the Laws of 1885. This Act of March 3, 1787, contains many provisions in relation to wills of real estate, but *the only provision in relation to wills of personal property* is as follows:

> "And be it further enacted by the authority aforesaid that it shall and may be lawful to, and for all and every person and persons, by his or their testament, or last will in writing, to give, bequeath or dispose of all his or her or their goods, chattels and personal estate *in the same manner as he, she or they lawfully might do before the passing of this Act.*"

Thus we find that, in respect of wills of personal estate, this statute *did not give nor purport to give,* any power of disposition by will, but *merely left that right to stand as it did before the statute was passed* —or, in other words, *left it to the common law*—and such remained the law of this State until the Revised Statutes of 1830.

This (as well as many other laws that it is not worth while to spend time in referring to), is embraced in the Revised Laws of New York of 1813 in precisely the same shape as in the Act of March 3, 1787.

> See Revised Laws, Chapter 23, passed March 5th, 1813, entitled "An Act concerning Wills," Section XVI., pp. 364, 367.

In the year 1827, there arose in the State of New York a controversy in relation to the validity of a certain testamentary paper written by one John G. Leake, which after his death was found among his papers. The paper was entirely in his own handwriting, but it had neither signature nor witness. His name was mentioned at the outset. He left a personal estate of about $250,000. He left real estate of about equal value with the personalty. No heir or next of kin of this man was ever discovered so as to be recognized. Some claims of that sort were made, but they were all rejected by the State, to which the real estate of Leake unquestionably escheated upon his death.

The paper above mentioned was propounded as a will of personalty by two of the persons named in it as executors. Its probate was resisted by the public administrator and also by a person claiming to be of kin to Leake, but which kinship the Court held to be merely imaginary. The case was regarded as one of very great importance, because of the amount involved, which was then regarded as being very large, and it was contested throughout most vigorously by distinguished counsel.

The Surrogate of New York admitted this unsigned and unattested paper to probate as a valid will of personal estate. The Chancellor reversed that decree of the Surrogate, and the ground on which mainly he placed his decision would seem to have been that this paper, notwithstanding the lack of signature and witnesses, might be a valid will, but that the circumstance of its having appended a seal and an attestation clause as though there was intended to be a signature opposite the seal and an attestation by witnesses, indicated that this was a paper which Leake did not intend to take effect until he should perform some further act in relation to it, and that, therefore, it was not his will. The Court for the Correction of Errors, after very elaborate argument, *reversed the Chancellor's decision, and admitted the paper to probate as the*

last will and testament of John G. Leake, and under it the personal estate passed.

This decision of the Court of Errors was made in the year 1829, and this paper was admitted to probate and the property passed under it *purely as a testamentary paper valid by the common law.*

By the time that this decision was made there had been enacted the Revised Statutes of 1830, containing certain regulations in relation to the signature of all wills *at the end* and the requirement of witnesses, which rendered unimportant, in respect of subsequent testaments, the questions which had been so elaborately argued and decided in this case. Therefore, the case was reported with great brevity, the reporter stating the following as the reasons for such brevity:

> " Although this case was argued by counsel with more than usual ability, and the opinions of the judges evince the fullest consideration of the principles of law applicable to the subject, and the most patient and deliberate examination of the cases which have arisen upon this branch of the law from the earliest decisions in England, and in this country to the present day, still the Revised Statutes of this State, which went into operation on the 1st January, 1830, having placed wills of personal property upon the same footing with wills of real estate in requiring the same to be *subscribed by the testator at the end of the will in the presence of at least two attesting witnesses* (2 Revised Statutes, 63), this case and the decision of it have become more a matter of curious interest than of practical use to the profession of this State for whom, principally, these reports are compiled; wherefore, the reporter reluctantly has come to the conclusion to refrain from attempting even a synopsis of the arguments of the learned counsel and from giving any part of the opinions delivered, except one or two conclusions contained in the opinion of the Chief Justice.
>
> " After a full examination of the elementary treatises on the subject of wills and most of the

cases bearing upon this question the Chief Justice lays down the following propositions: First. *That according to the common law as generally received and understood in England as well as in this country on the 19th April*, 1775 (*when the common law of England was by the Constitution adopted as part of the common law of this State*), the paper propounded as a will in this case would have been admitted to probate, although it was not signed by the testator at the end thereof, had an attestation clause, and was unattested by witnesses; and *second*, that although according to the modern decisions in the ecclesiastical courts of England if there be an attestation clause to the paper propounded as a will and it be unattested by witnesses such clause raises a presumption against the paper as furnishing proof that a further act was contemplated to be done, still, such presumption is but slight and may be rebutted by slight circumstances; and after examining this case, tested by this principle, he comes to the conclusion that the paper propounded should be admitted to probate, as in his opinion the circumstances fully rebut the slight presumption arising from the non-execution of the paper in the presence of witnesses."

Watts v. *Public Administrator*, 4 Wend., 168, 169–170.

Upon reference to the report of this case below in 1 Paige, Ch. 347 to 383, which contains the opinions of the Surrogate and the Chancellor, we think it appears to be probable that the Chancellor would likewise have concurred in admitting this will to probate, if it had not been for the fact that the testator, by adding a seal, without signature opposite, and an attestation clause, indicated an intention on his part to do something further before the paper should be allowed to take effect.

We think that there can, therefore, be no doubt that, up *to the first day of January*, 1830, *the right to dispose of personal property by will in the State*

of New York rested upon the common law, and upon nothing else.

Now we come to the provisions of the Revised Statutes.

The only provisions of the Revised Statutes applicable to this subject that we find are two. Part II., Chap. VI., Art. II., Section 21, 2 R. S., 60, is as follows:

> "Every male person of the age of eighteen years or upwards, and every female not being a married woman of the age of sixteen years or upwards, of sound mind and memory, and no others, may give and bequeath his or her personal estate by will in writing."

As to this, we observe that in respect of any male person of the age of *twenty-one years or upwards* this statute does not give or confer any new right or privilege whatsoever. *It merely recognizes or affirms the existing right of such a person as at common law.*

To bring this point to the test, let us suppose that by a subsequent statute the Legislature had merely repealed this Section 21, stopping with such repeal. There can be no doubt that any person, who would have had the right at common law, would have had the right after the repeal of the statute exactly as he would have held it on the day the statute had passed.

The other provision is this (Part II., Chap. VI., Article III., Section 40):

> "Every last will and testament of real or personal property or both shall be executed and attested in the following manner:
>
> "1. It shall be subscribed by the testator at the end of the will.
>
> "2. Such subscription shall be made by the testator, in the presence of each of the attesting witnesses, or shall be acknowledged by him to have been so made, to each of the attesting witnesses.
>
> "3. The testator at the time of making such subscription or at the time of acknowl-

edging the same shall declare the instrument so subscribed to be his last will and testament.

"4. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness at the end of the will at the request of the testator."

It is entirely clear that, in respect of any and every person who had, on the day before this statute went into effect, a common law right to dispose of his personal property by will, this statute is no more than *an affirmance of that right, with the addition of some new restrictions imposed upon its exercise, in respect of matters of form only and not in respect of the power to make such a will.* In so far as it changed the status of such a person, it not only *gave him no new right*, but it did *not*, in even the smallest degree, or in any respect whatsoever, *enlarge* the right which he already had. The effect of this statute upon him was merely to *abridge* his existing right by imposing certain new *formalities* in respect of the exercise of it, and it is as true in respect of this section as of the other that we have referred to, that if the Legislature should pass a statute repealing these provisions, in so far as they apply to personal estate, the common law right of the individual to dispose of his property by testament would remain in full force and effect, as completely as it existed on the day before this statutory provision was enacted, and relieved from the necessity of observing the additional formalities which this repealed statute had provided.

We have thus, we think, ascertained and shown satisfactorily, that the right of testamentary disposition which *Joseph Plummer* exercised when he made his will disposing of these bonds, the tax upon which is now in question, was *not* a right or privilege conferred upon him by *statute* of the State of New York. Nor did Ella Plummer Brown, in accepting and receiving the benefit of the disposition made by this will, do so in virtue of any

right or privilege conferred upon her by any statute of the State of New York. She takes her interest in this bequest in virtue of the right which she had *at common law*. We have before referred to Blackstone's statement of the right of legatees to take, within which she certainly comes.

The claim of our adversaries is, that this right of Joseph Plummer to dispose of his property by will, and this right of Ella Plummer Brown to receive the benefit of this disposition, were purely *privileges* conferred upon them by the State of New York, and that they are so bounden to the State for its grace and favor in conferring upon them this privilege, that the State had an absolute right to take to itself the property which the testator undertook to dispose of, or to tax it *ad libitum*, and that this assumed right and privilege, alleged to have been granted to these two persons, is of *such sacred and extraordinary character*, in respect of the indebtedness of the United States to Plummer, which formed the subject of this bequest by him in trust for the benefit of his daughter, *as to entitle the State to lift this subject matter out of the exemption* from taxation which in any and every respect, other than this particular disposition it confessedly enjoyed, and to *subject this otherwise wholly untaxable subject-matter* to State taxation *ad libitum* through the medium of a tax upon this alleged privilege. We think we have sufficiently shown that this claim on the part of the State, and of our adversaries as its representatives, is in each and every part of it wholly unfounded.

We find, instead of this assumed right and privilege being an extraordinary and special privilege granted to these persons, carrying with it these extreme consequences, that, when Joseph Plummer executed this will, *he merely exercised a right* which belonged to him *in common with any one and every one else* (not under special disability) *in virtue of the law of the land*, and that *Ella Plummer Brown received* the benefit of such bequest equally under *a common*

law right, belonging to her and all others, and that these rights, and rights of this precise character, of the testator and the legatee, had existed *in every citizen of this State from the time it became a State, and had existed in every subject of England from* the time when we separated from the sovereignty of our mother land, *running backwards to a time more than a thousand years* from this day, and that *during that period of a thousand years there has not been one day when a citizen of New York*, since it became a State, *or a subject of England* before this State separated from it, *did not possess this right and power as of common right.*

We do not see, if these particular rights of Mr. Plummer and his daughter in respect of the disposition or transfer of this property from the one to the other can lawfully be assumed to be held, not as common rights but as special privileges, and to be therefore subject to these very extraordinary consequences, why almost any and every other right relating to property or the disposition of it, held under the common law and now held by the citizens of New York under that law, would not be in like condition and equally subject to like consequences.

We do not forget or fail to bear in mind the provision of the Constitution of 1777 to the effect that the acceptance as law of this State of the old common law and the statutes which were in force in the Colony on the 19th of April, 1775, was declared to be subject to such alterations and provisions as the Legislature of this State shall from time to time make concerning the same. We do not doubt, and do not know that any one else has doubted, that the Legislature of this State has a right to make alterations, within allowable limits, in the laws existing, whether as common law or as statutory law, prior to and at the time when this State became a State. We do not concede, and think it will hardly be claimed, that this right was illimitable so as to entitle the State to take away all and every right whatsoever in respect of

the enjoyment of liberty and property which had previously existed, and which had been regarded as forming a part of the rights and liberties of our ancestors. We think it cannot be needful to enter at large into this entire subject and to undertake to specify in detail all that the Legislature can or cannot do. Certainly, *at the time when Joseph Plummer made this will* and his daughter received the benefit of it *the Legislature of this State had not, nor has it up to this time passed any statute taking away or purporting to take away the right of Plummer to make the bequest or the right of his daughter to receive it.* These assumed privileges, to the enjoyment of which by Plummer and his daugther, our adversaries ascribe such extraordinary results, certainly were not privileges which the Legislature of New York has ever granted to Plummer or his daughter. We know of no such grant, and feel quite confident that there has never been one. If our adversaries claim that there has been such a grant, it is for them to point it out, so that it may be seen when and where the grant was made, and what precisely are its terms. Of course, to be of any service to our adversaries, it must have been prior to the time when, if ever, the right of the State to this tax accrued, upon the death of Plummer, and the passing of this portion of his estate to the executor and trustee upon the trust for the benefit of the daughter.

It being clear that there has been no actual grant by the State of these alleged privileges, the contention of our adversaries must be (if they continue to base their contention upon this alleged grant) that the *forbearance* of the State to take away by statute the ancient common law right, which for a period of more than a thousand years has existed without interruption in England, from which we sprang, and in this State ever since it became a State, being always held by all subjects in England and by all the citizens of New York as a common right inherent in all sub-

jects and citizens, save those under special disability, amounted in legal effect to the grant of a privilege, with the attendant result which they claim. If our adversaries put their claim on this basis, it seems to us to be entirely baseless.

If this new doctrine of special privileges granted by mere implication, and that *a far fetched implication* such as this, be admissible, why is it not likewise applicable to an immense mass of now existing rights held by all the citizens of this State as of common right, subject only to future modification by due exercise of the law making power in the discretion of the Legislature? If such wide application of this extraordinary doctrine is to be sanctioned, would not the result be such that it may almost be said that we all live, move and have our being upon the basis of *special privileges*, and are clothed therewith as with a garment. If we confine ourselves to this particular subject-matter, why would not all sales, pledges, and gifts *inter vivos* and other doings of any kind in respect of these bonds be also privileges, inasmuch as the existing rights in respect of them are held subject to future modification or change by the Legislature.

We have hitherto supposed, and still suppose, it to be a general principle, that when a litigation arises between individuals, *it is to be disposed of in accordance with the law existing at the time when the legal determination in respect of it is to take place, or at the time of the accruing of the rights in controversy, or at all events at some definite time, present or past*, and *not* in accordance with or on the basis of *imaginary possible* laws. To adjudicate an existing controversy relating *to present or past actual transactions or relations upon the basis of possible future legislation suggested by one of the parties to the controversy, and certainly resting merely in imagination, and in no respect in actuality, would certainly be a novelty* as to any claim made for adjudication upon the basis of

such imaginary possible future laws. Would it not be sufficient to give the answer which we give here, that adjudication upon the basis of any such future laws can only be after such laws shall have been actually passed, and cannot be called for where they are as yet *in nubibus?*

To allow a legal controversy in relation to real things and doings to be thus disposed of by imagination of possibilities in future, would be a decided violation of sound principle and just right, and be quite inadmissible; and in this particular case, the practical application to real rights now subsisting, of this imaginary *basis of supposing the Legislature to have exercised actually the abstract right* alleged to be inherent in the State to take to itself upon the death of each and every citizen (an event sure to happen eventually to all) the entire property of the citizen, and deal with it as its own at its mere will and pleasure, in entire disregard of any expressed will of the deceased, and of the just claims and reasonable expectations of his family and all his kindred, whether near or remote, although in fact the Legislature or the State had never done or attempted to do any such thing, would *not only be a clear violation of sound principle, but involve an intolerable hardship*, inasmuch as, assuming the existence of the alleged abstract right of the State upon the death of its citizens to confiscate all their property and take it to itself, it cannot fairly be denied that such alleged abstract right, *if existing, is merely theoretical, and never can or will be made practicable*, for that no legislature, in the majority of whom there was any sense of right, justice or decency, would ever desire or be willing to take any such step; and if there should ever be a legislature, the majority of whom consisted of men so devoid of the sense of right, justice and decency as to wish to do such a thing, they would never dare to do it, because they would know and feel, in case of their doing so, that from and after the expiration of their

then present terms, the places in the legislative halls, which had theretofore known them, would know them no more.

With reference to the right of the Legislature under the reservation contained in the Constitution of 1777 to make alterations in the common law, which was adopted *en masse* by that Constitution subject to subsequent exercise of legislative power we make the following further remarks:

We do not dispute that in virtue of that reservation, *or without it*, the Legislature would have the right to pass laws altering in very many particulars the existing status existing under the common law as adopted by the Constitution of 1777. It may be said that the Legislature had a general right thus to vary the law, but that right was by no means absolute and unrestricted. Whatever the extent of the right, it *was not and is not* in any sense or to any extent or effect a *property right* or *proprietary right* of the State. It was and is merely *a right of regulation* in its discretion, presumably for the benefit of the people in general, carrying out it may be the policy of the State in making any provisions not in themselves clearly unreasonable for the general benefit. But this right of regulation did not and does not give to the State any power to *substract any portion of the property which it has the power thus to regulate, and take it to itself.* It did have the right, though we think *not* under or in virtue of the reservation contained in the Constitution of 1777, and we think would have had the right without any such reservation, and has the right now, to impose taxation for its legitimate purposes upon property held and enjoyed by its citizens, whether held under the old common law adopted by the Constitution of 1777 or under any other right, but the taxing power is wholly different from the *regulating* power above referred to, and this inherent difference should not be lost sight of.

We admit that it would not be competent for the

courts, in passing upon an act of the legislature enacted under the *regulating* power, to set aside the act merely because they thought that upon the whole it was not wise and ought not to have been enacted. But we submit that *under the operation of the Fourteenth Amendment of the United States Constitution*, if not before, a statute of the State *greatly impairing, or taking away altogether, existing rights of property, or rights properly incident to the ownership of property, or other existing rights*, which it needs not that we should here particularize, may be rightfully set aside by a court, if it finds such statute so *clearly unreasonable or outrageous* as to be a violation of the just rights of the citizen under that amendment to the Constitution of the United States, or under the similar constitutional provision which has existed in the State of New York ever since the year 1846.

See authorities hereafter cited.

With reference to the particular disposition made by Joseph Plummer in his will, whereby he gave to his daughter out of property which belonged to him as clearly and unquestionably as any property can belong to any one, the income for her life of $40,000 in amount of United States bonds, we submit that if the Legislature had passed an act, the effect of which would be to prevent him from making, out of the property belonging to him, such a provision for the child whom he had begotten, such legislative act, or attempted act, would have been in violation of his constitutional rights, and that any statute purporting to forbid the daughter to receive and take the benefit of such a disposition made by her father would have been in violation of her constitutional rights.

So, in case of a change made by the State in the statute of distributions as to who, in case of intestacy, shall take as next of kin, and in what proportions. Doubtless the Legislature had the right, to make changes or modifications in the

statute of distributions; but it must not exercise that right in a manner or to an extent clearly unreasonable. For instance, if they should enact that in distribution upon intestacy of the personal property of the intestate, his wife and his children and lineal descendants, his father and his mother and his brothers and his sisters, shall be entirely passed over and their just rights and claims be entirely disregarded, not merely in a particular case or under particular circumstances, but in any and every case and under all circumstances, and that the whole personal estate of the decedent shall go to his exceedingly remote relatives, say those *not* nearer in kindred than the ninth degree, a court might and ought to hold a statute so unreasonable and outrageous to be unconstitutional and a mere nullity, and that as the Legislature, having a desire to exercise its right to make changes in the statute of distributions, had not chosen to do so otherwise than in a manner and to an extent which was utterly unreasonable and could not be submitted to, and as the Court had no power to alter the statute so as to make it reasonable, the result must be, to annul the abortive statute, *leaving the prior existing statute of distributions to stand, subject to the power of the Legislature subsequently to modify or change it in any reasonable manner or to any reasonable extent as it might deem fit.*

Now, in respect of real estate. The title to a great part of the real estate of the State may be traced back in the chain of title to an original conveyance from the State as original owner to the predecessor in title of the present owner, the grant being to the original grantee, *and from him to each of his successive grantees*, with *habendum* to *him and his "heirs and assigns forever."* That conveyance involves the contract that the grantee may transfer to "*heirs and assigns*," though an executed contract, is by the constitutional prohibition against impairing the obligation of contracts, as completely pro-

tected from impairment by any act of the State, the original grantor as is an executory contract from being so impaired, by a party to it.

We now make some further quotations from Blackstone's Commentaries and the notes to it which we take to be the work of Chitty.

In Book IV., page 424, in the latter part of Volume II., of Chitty's Edition, we find the following:

In speaking of Magna Charta he says:

> "With respect to private rights *it established the testamentary power of the subject* over part of his personal estate, the rest being distributed among his wife and children; it laid down the law of dower as it hath continued ever since and prohibited the appeals of women unless for the death of their husbands. * * * And lastly (which alone would have merited the title that it bears of the great charter) it protected every individual of the nation in the free enjoyment of his life, his liberty and his property unless declared to be forfeited by the judgment of his peers or the law of the land."

On pages 10 and 11 Book II., latter portion of Volume I. (Chitty's Edition) we find notes which we take to have been written by Mr. Chitty, from which we quote as follows:

> "Upon whatever principle the right of property is founded, *the power of giving and transferring seems to follow as a natural consequence;* if the hunter and the fisherman exchange the produce of their toils, no one ever disputed the validity of the contract or the continuance of the original title. This does not seem to be aptly explained by occupancy, for it cannot be said that in such a case there is ever a vacancy of possession. I cannot agree with the learned Commentator that the permanent right of property vested in the ancestor himself (that is, for his life) is not a natural but merely a civil right. I have endeavored to show (Note 1) that the notion of property is universal

and is suggested to the mind of man by reason and nature, prior to all positive institutions and civilized refinements. If the laws of the land were suspended, we should be under the same moral and natural obligation to refrain from invading each other's property as from attacking and assaulting each other's persons. I am obliged also to differ from the learned Judge and all writers upon general law who maintain that children have no better claim by nature to succeed to the property of their deceased parents than strangers; and that the preference given to them originates solely in political establishments. I know no other criterion by which we can determine any rule or obligation to be founded in nature than its universality; and by inquiring whether it is not and has not been in all countries and ages agreeable to the feelings, affections and reason of mankind. The affection of parents towards their children is the most powerful and universal principle which nature has planted in the human breast: and it cannot be conceived, even in the most savage state, that any one is so destitute of that affection and of reason who would not revolt at the position that a stranger has as good a right as his children to the property of a deceased parent. *Haeredes successoresque sui cuique liberi*, seems not to have been confined to the woods of Germany, but to be one of the first laws of the code of nature; though positive institutions may have thought it prudent to leave the parent the full disposition of his property after his death, or to regulate the shares of the children, when the parent's will is unknown.

In the earliest history of mankind we have express authority that this is agreeable to the will of God himself; *and behold the word of the Lord came unto Abraham, saying, this shall not be thine heir; but he that shall come out of thine own bowels shall be thine heir.—Gen. c. 15.*"

The case at bar is a New York case, largely involving considerations of New York law. The quite conclusive summary upon this subject, therefore,

presented by the terse and incisive observations of Chancellor KENT—a master of the law in general and of the law of that State in particular—may well be quoted at this point. Referring to the principles, whether the outgrowth of natural or municipal law, governing the acquisition and disposition of property, he says (2 Kent's Com., 318, 320, 325–328):

> "*Occupancy* doubtless gave the first title to property, in lands and movables. It is the *natural and original method* of acquiring it; and upon the principles of universal law, the title continues so long as occupancy continues."

Again (p. 320):

> "The *exclusive right of using and transferring property follows, as a natural consequence*, from the perception and admission of the right itself."

Again (p. 323):

> "The title to it was gradually strengthened, and acquired great solidity and energy, when it came to be understood that no man could be deprived of his property without his consent, and that even the honest purchaser was not safe under a defective title."

Finally he says (p. 325):

> "Title to property, resting originally in *occupancy*, ceased, of course, upon the death of the *occupant*. Sir William Blackstone considers the descent, devise and transfer of property, political institutions and creatures of the municipal law, and not natural rights; and that the law of nature suggests that, on the death of the possessor, the estate should become common, and be open to the next occue pant. He admits, however, *that for the sake of peace and order, the universal law of almost every nation gives to the possessor the power to continue his property by will; and if it be not disposed of in that way, that the municipal law steps in and declares who shall be heir*

of the deceased. As a mere speculatieve question, it may be doubted whether this be a perfectly correct view of the law of nature on this subject. The right to transmit property *by descent*, to one's own offspring, is dictated by the *voice of nature The universality of the sense of a rule or obligation is pretty good evidence that it has its foundation in natural law.* It is in accordance with the sympathies and reason of all mankind, that the children of the owner of property, which he acquired and improved by his skill and industry, and by their association and labor, should have a better title to it at his death than the passing stranger. It is a continuation of the former occupancy in the members of the same family. *This better title of the children has been recognized in every age and nation, and it is founded in the natural affections, which are the growth of the domestic ties and the order of Providence.* But the *particular distribution among the heirs of the blood, and the regulation and extent of the degrees of consanguinity, to which the right of succession should be attached, do undoubtedly* depend upon positive institution; and it seems to be the general doctrine, founded on the history of all nations and ages, that property in land, when such property began to exist and to be recognized, was originally vested in the state or sovereign, and derived by grant to individuals.

"*The power of alienation of property is a necessary incident to the right of property,* and was dictated by mutual convenience and mutual wants. *It was first applied to movables;* and a notion of separate and permanent property in land could not have arisen until men had advanced beyond the hunter and shepherd states, and become husbandmen and farmers. Property in land would naturally take a faster hold of the affections, and from the very nature of the subject, it would not be susceptible of easy transfer, nor so soon as movable property, be called into action as an article of commerce.

"*Delivery of possession was, anciently, necessary to the valid transfer of land.* When actual delivery became inconvenient, sym-

bolical delivery supplied its place, and as society grew in cultivation and refinement, writing was introduced, and the alienation of land was by deed.

"*The gratuitous disposition of land by will was of much slower growth than alienations, in the way of commerce, for a valuable consideration; because the children were supposed to have a right to the succession on the death of the parent; though Grotius considers disposition by will to be one of the natural rights of alienation.* In the early periods of the English law a man was never permitted totally to disinherit his children, or leave his widow without provision. Testaments were introduced by Solon into the Athenian commonwealth in the case in which the testator had no issue; and the Roman law would not allow a man to disinherit his own issue, *sui et necessarii hæredes*, his natural and domestic heirs or children, and their descendants, without assigning some just cause in his will. The reason of the rule in the civil law was that the children were considered as having a property in the effects of the father and entitled to the management of the estate. The *querela inofficiosi testamenti* was an action introduced in favor of the children to rescind wills made to their prejudice without just cause. But the father could charge his estate with his debt, and so render the succession unprofitable; and the children could, in that case, abandon the succession, and so escape the obligation of the debts.

"In England, the right of alienation of land was long checked by the oppressive restraints of the feudal system, and the doctrine of entailments. All those embarrassments have been effectually removed in this country; *and the right to acquire, to hold, to enjoy, to alien, to devise and to transmit property by inheritance to one's descendants, in regular order and succession, is enjoyed in the fulness and perfection of the absolute right. Every individual has as much freedom in the acquisition, use and disposition of his property as is consistent with good order and the reciprocal rights of others.*"

Later in his Commentaries Chancellor KENT says—and it must be borne in mind, as we have said, that he is speaking, not only from the general point of view of an eminent jurist, but particularly from the standpoint of one brought up under, and writing in relation to, the law of the State of New York, in which more particularly we are now interested—

> "*The transmission of property by hereditary descent, from the parent to his children, is the dictate of the natural affections; and Dr. Taylor holds it to be the general direction of Providence.* It encourages paternal improvements, cherishes filial loyalty, cements domestic society; and nature and policy have equally concurred to introduce and maintain this primary rule of inheritance, in the laws and usages of all civilized nations."
>
> 4 Kent's Com., 376.

After speaking of this right to acquire and dispose of property, Chancellor KENT, in speaking of the regulation of that right by the Legislature, refers to the fact that all property must be held in subjection to reasonable regulations by the law-making power for the public good,

> "on the general and rational principle, that every person ought so to use his property as not to injure his neighbors, and that private interests must be made subservient to *the general interests of the community.*"
>
> 2 Kent's Com., 340.

And such is the plain limitation upon the power of the Legislature in respect to the imposition of regulations upon the use and disposition of property. They must, in each instance, be *reasonable* and for the *public welfare and general interests* of the community.

What we have said in regard to wills is confined chiefly to those of *personal estate.*

In respect to wills of real estate, we do not think

it needful or appropriate to enter into any very enlarged discussion, inasmuch as no such question arises upon the facts presented by this case. We only refer to them briefly because of some possible connection by way of analogy to points arising in relation to wills of personalty.

In respect of the right to disposition of real estate by devise as well as in respect of natural right, we think that real estate does not stand on quite as strong a ground as the right to personalty and to the disposition of it.

In respect of the right of disposition of real estate by will, Blackstone treats of it in Chapter 23, "of alienation by devise" (Book II., Vol. 1, Chitty's Edition, pp. 373 to 383). Blackstone says on pages 372 to 373:

> "*It seems sufficiently clear that before the Conquest lands were devisable by will.* But upon the introduction of the military tenures the restraint of devising lands naturally took place as a branch of the feudal doctrine of non-alienation without the consent of the lord."

And then, after remarks upon the subject which we need not take time to quote, he refers to the statute of 32 Henry VIII., Chap. 1, explained by 34 Henry VIII., Chap. 5, which enacted that all persons being seized in fee simple, except *femmes covert*, infants, idiots and persons of non-sane memory, could by will and testament in writing devise to any other person, except bodies corporate, two thirds of their lands, tenements and hereditaments held in chivalry, and the whole of those held in socage, which now, through the alteration of tenures by the statute of Charles II., amounts to the *whole of their landed property* except their copyhold tenements. He then gives a history of the supposed bearing of the Statute of Frauds in regard to the making of wills, and then notices the distinction with which lawyers are usually

familiar that a devise of estate in lands was regarded merely *as a species of conveyance*, from whence arose the distinction that a devise of lands under, the old law, would apply only to property which the testator owned at the time of executing the will, so that after acquired lands would not pass, whereas a testament of personalty would operate upon the entire personalty which the testator held at the time of his death; which restriction of the devise of real estate to that which the testator owned at the time of executing the will remained the law of New York until the Revised Statutes of 1830.

We do not think it worth while to enter into the consideration of these questions relating to the devises of land to any considerable extent. The Statute of 1787 (Laws of 1787, Chapter 47, 2 Laws of New York, Chap. 445) to which we have before referred, which was our original statute of wills, did contain quite elaborate regulations in respect of wills of real estate. It does not seem to be worth while to refer to the details of this statute, inasmuch as they have no reference whatever to wills of personalty except the short clause which we have already quoted, *which left wills of personalty to stand upon the common law wholly unaffected by the statute. But it may be worth while to refer to the present Constitution of the State of New York.*

The New York State Constitution of 1894 (the present Constitution of the State) contains two provisions. Article 1, Sections 10 and 12, provide as follows:

> "The people of this State in their right of sovereignty are deemed to possess *the original and ultimate property* in and to all lands within the jurisdiction of the State, and all lands *the title to which shall fail from a defect of heirs shall revert or escheat to the people.*"
>
> "Section 12. All lands within this State are declared to be allodial, so that, *subject only to the liability to escheat, the entire and absolute property is vested in the owners*, according to the nature of their respective estates.

Section 11 abolishes all feudal tenures, and, as we believe they are very nearly all gone, it does not seem to be very material to refer to them. Taking Sections 10 and 12 together, the construction is simple and unquestionable.

Section 10 provides that the people of the State in their right of sovereignty are deemed to possess the *original* and *ultimate* property to all lands within the jurisdiction of the State, and all *lands the title to which shall fail from a defect of heirs shall revert or escheat to the people.* The only fault to be found with this section is, we think, that it is not precisely as grammatical as it ought to be; yet there is no difficulty in understanding what it means. The statement is that the State is deemed *to possess* the *original* and *ultimate* property in lands. The evident meaning was, and for strictness or accuracy of language it should have been so expressed, that the people are *deemed to have possessed* the original property in lands, and they *shall possess the ultimate property in case of escheats for want of heirs.* They are *deemed* to have possessed the original property, because as we all know very great portions of the area of the State are held under grants made by the Crown or its representatives, while it was yet a colony, and the intent of these provisions of the present constitution is, that when any lands *granted either by the State or its colonial predecessors or by the King* shall fail to have an owner by reason of their being no heirs, the State shall have the ultimate property in them, that is to say, that the lands shall escheat or go back to the State, whether originally granted by the State or by its predecessors. But Section 12 declares that all lands within the State are declared to be allodial, which frees them from all of the feudal rights, so that *subject only to the liability to escheat for want of heirs,* which is provided for by Section 19, *the entire and absolute property,* in the words of that section, is vested in the owners. The effect of it is precisely this: that the right of ownership in real estate held under allo-

dial tenure, as all land in this State now is, is *the entire and absolute property of the owner, subject only to the liability to escheat in case of failure of heirs.*

Now, we think that under this Constitution the idea that the State by repealing the statute of wills and making none other in its place, and by repealing the statute of descent and making none other in its place, could take to itself real estate held under allodial tenure by its present holders, with this *absolute ownership declared by the Constitution* to be vested in them, subject only to the liability to escheat for want of heirs *is entirely exploded.* The provision of the Constitution is that it is the *absolute property of the owner.*

The contention of those who maintain the doctrine, as well in respect of realty as of personalty, which we combat is, if we correctly understand it, that the right of the owner of property whether real or personal, however absolute it may be during life, is *absolutely held at the mercy of the State from the moment of death;* that the rights, or at least the vested right of ownership, cease with life; and that the State may do what it pleases with the property. We find it provided by this Constitution, which is the paramount law of the State of New York, that real estate is the *absolute property of the owners*, subject *only* to the liability to escheat or go back to the State *upon failure of heirs*, while the doctrine of our adversaries is, that it shall go back to the State, *not upon failure of heirs, but, as of course, upon the death of the present owner*, or at least that, upon that event, potentially, the State may take it back, if it shall choose to do so.

There is no provision in the Constitution in relation to personal property analogous to that in respect of escheat of real property upon failure of heirs, the reason of which omission we take to be that, so far as we know or have ever heard, there has never, until this recent doctrine came up, been a claim by

any one that the right of the owner of personal property was subject to action by the State analogous to the escheats of realty, *save only* that upon the death of the owner of personalty having made no testament and having no next of kin, so that there is absolutely no person in existence having any pretense of right to the property possessed by the decedent, the State *ex necessitate* may properly take possession of and hold the property after payment of debts, *unless and until* some one of kin shall appear, because there is no one else, on the face of the earth, who has any right to say nay to such action, and it must either be taken into possession by the State *ex necessitate* under the doctrine we have referred to, *or* be left open to be seized by any marauder who may come along, or to be *carried off as spoils* by such of a number of marauders who come along as, upon a free and fair or unfair fight, may prove to be the strongest and carry it off.

We proceed now to a further discussion of the proposition of our adversaries, that, upon the death of the owner of personal property, all absolute right or title to it on his part ceases, that all rights in respect of the disposition of it after his death, whether by will and testament, or by distribution in case of intestacy, are the creatures of the law, and that the State has absolute control, and has the right to prevent any disposition by will and to take the whole of the property to itself. We find this proposition substantially stated in the brief of our adversaries in this case, when the suit was pending in the Court of Appeals of the State of New York, and we suppose the same proposition will be advanced here.

We quote from the brief of our adversaries in the Court of Appeals, as follows:

> "It must be conceded under the authorities that the State has the right to prevent a disposition by will and take all of a decedent's property; to take all would not be unconstitutional and therefore to take part cannot be."

We have before referred to the first Constitution of the State of New York of 1777, adopting the old common law, which provides that such adoption shall be "Subject to such alterations and provisions as the Legislature of this State shall from time to time make concerning the same."

In respect of the common law right of disposition of property by will, the State has made no other alteration than the provision of the Revised Statutes of 1830, which we have referred to, imposing certain additional formalities, but in nowise interfering otherwise with the old common law right, and that new provision, as we have said, in no wise affected the substantial right to dispose of the property by will. It merely prescribed additional *formalities*, and this, as we have said, in so far as it had any effect, was rather an abridgment than an extension of the common law right. But as the right stood after this alteration in certain forms by the Revised Statutes of 1830, it was all-sufficient for our purposes, and so it has stood until this day.

It is clear, therefore, that *thus far there has been no grant* by the State of New York to its citizens of any right of testamentary disposition of personal estate which they did not hold under the common law as adopted by the Constitution of 1777. But as we do not know but that our adversaries may go so far as to claim that the non exercise by the State of the right to make, in respect of this common law right, such alterations and provisions as the Legislature of the State shall from time to time see fit concerning the same, and the non-exercise by the State of the alleged power to take it away altogether and take the property to itself, amount in legal effect to the grant of a franchise or privilege to every citizen of this State, including Joseph Plummer, and that, therefore, there had been in effect a grant of this privilege to Plummer before his death by means of the *forbearance* of the State to take away the right of disposing of his property by will and to take the property to itself under the assumed right alleged

by our adversaries—in short, that such forbearance amounts in legal effect to the grant of a special privilege to *each and every citizen* of the State having, under the common law, the right to make a will, and that there have been as many of such grants or privileges as there have been citizens of this State in existence from the time of the organization of the State in 1777 down to this day—we shall make a few further comments on that contention.

It seems to us well enough, therefore, in this connection, to consider briefly the question as to the effect of this reservation by the State in the Constitution of 1777, when it adopted the old common law, of the right to make such alterations and provisions as the Legislature of the State should from time to time enact concerning the same.

See authorities and discussion under next Point.

We do not think there can be any serious difficulty in defining the extent of the right thus reserved or the method in which it must be exercised, if exercised at all. We freely concede that under this reservation there exists, and that without any such reservation there would exist, a right in the State of New York to exercise the legislative power in respect of this subject-matter—the power of disposition of property by will—as in respect of other property rights and subject-matters; *subject always to the condition that no such legislation shall be subversive of the fundamental rights of the citizens, securing them against the deprivation of life, liberty or property without due process of law*, and subject probably to other limitations which it is unnecessary here to consider, and which it would take more time to define and expound than would be convenient for us on the present occasion.

But we think we may say beyond peradventure that this right of legislation, like other rights of legislation, is *not a property right or proprietary right in the State*, and that, however large may be

the measure of the State's discretion in the exercise of such right, it *cannot be exercised to the extent of taking to itself the property of a testator*, or would-be testator, upon the notion of the State's being proprietor. It has undoubtedly a broad general power of *regulation* of this subject, as of most other subjects. We do not know that it is any broader in respect of the enjoyment of property after death than in respect of the enjoyment of property before death. It is a power of *regulation;* and, however broad may be the power to *regulate, it does not embrace the power in the regulator to take to itself, as its own, the property over which it has the power of regulation.* We think that that goes without saying.

As far as we can see, this notion of the State's right to *grab* and dispose of, at its will, the entire property of a decedent, would, if exercised, have a very bad effect. In so far as asserted *for the purpose of supporting these death duties upon property passing by will or intestacy, it is not in any degree necessary to rest the right to impose such taxes on any such basis.* The general right to impose such taxes exists in respect of property generally. So this Court held in the case of *Scholey* v. *Rew*, 23 Wall., 331, in which the imposition of such a tax by the United States was sustained, and this Court declared such tax to be a *duty or excise.*

When the tax is imposed in virtue of the general right of taxation and in accordance with those rules of equality and justice which have been established as prerequisites of the right, it is all well enough, *and there does not seem to be any basis in reason for establishing this doctrine we are discussing as a ground for supporting the States's right to tax the property of the testator or intestates*, unless it be for the purpose of enabling the State to make disposition of the property of a decedent free from the operation of the wise and just rules which have been established for regulating the imposition of taxation, pure and simple. It would be very dele-

terious to the public interest to sustain this doctrine for that purpose.

In *Minot* v. *Winthrop*, 162 Mass., 113, the late Chief Justice FIELD said (p. 117):

> "The descent or distribution of property on the death of the owner in England and in this country has always been *regulated* by law. We have no occasion in these cases to consider whether the Legislature has the power to make the Commonwealth the universal legatee or successor of all the property of all its inhabitants when they die, for the purposes not only of paying the public charges, but also of distributing the property according to its will among the living inhabitants, or for the purpose of abolishing private property altogether. *We assume that under the Constitution this cannot be done, either directly or indirectly; that the Legislature cannot so far restrict the right to transmit property by will or by descent as to amount to an appropriation of property generally; that it cannot impose a tax which shall be equivalent, or almost equivalent, to the value of the property, and cannot so limit the persons who can take as heirs, devisees, distributees, or legatees that the great mass of all the property of the inhabitants must become vested in the commonwealth by escheat. The State can take property by taxation only for the public service, and we assume that its right to take property, if any exists, by regulating the distribution of it on the death of the owner, is limited in the same manner, and that this right must be exercised in a reasonable way.* * *
>
> If, under the power to regulate the devolution of property on the death of the owner, the Legislature cannot take away altogether the inheritable quality of property, yet such *regulations* as are thought *reasonable* concerning the persons who may take or transmit real or personal property by will or inheritance have been made in every civilized State."

Fifth Point.

As to the NATURAL RIGHT TO DISPOSE OF PERSONAL PROPERTY BY WILL—*a right recognized by the express contract provision for an assignment of these bonds, either during life or at death—and its consequent effect upon the legal right, and as to the mistakes which have sometimes arisen, in legislatures and courts, from misconceptions on this subject; and, further, as to the* PROTECTION OF THAT RIGHT BY THE FOURTEENTH AMENDMENT.

We have now to consider a proposition asserted by our adversaries, and from which they seek to deduce very important legal results.

The proposition, if we correctly understand it, is that notwithstanding such natural or absolute right as the owner of personal property may have to, or in respect of, it, up to the time of his death, such right does *not, as a natural right* at all *survive him*, or pass to his personal representatives or legatees or next of kin, save only in so far as, if at all, the State may choose to allow it to so pass; but that *potentially* it all belongs to the State, and that *practically and lawfully* the State may take it all to itself, and deal with it at its absolute unrestricted will and pleasure.

We submit that there is no real difference to the apprehension of right reason and common sense in the natural right of man, between the right to dispose in one's lifetime *in præsenti* of personal property which he has rightfully acquired, and which is entirely his own; and the right of disposing of it by an act taking effect in possession or enjoyment after his death. He has as good natural right to do the one as to do the other.

It must be admitted that a man has the natural right and the lawful right by the law of this land to sell property which belongs to him. He has as good

and as complete a right to give it away, if he chooses, as he has to sell it, and if the *Fourteenth Amendment* (as well as Art. 1, Sec. 6, of the New York Constitution of 1894), protects, as it does, from unjust impairment, his right to *sell*, it likewise protects his right to *give*.

In *People ex rel.* v. *Otis et al.*, 90 N. Y., 48, a case in which a statute was under review, which relieved a municipal corporation from liability upon certain bonds to any person purchasing the same after publication of a notice, the Court said (at p. 52):

> "*Depriving an owner of property of one of its essential attributes, is depriving him of his property within the constitutional provision, and a legislative declaration that, upon the publication of notice, a negotiable security shall no longer be transferable, is not due process of law*, working a forfeiture of the right given by contract."

In *Forster* v. *Scott*, 136 N. Y., 577, a statute provided that no compensation should be allowed, when land was taken for a street, for buildings erected thereon after the map for the proposed street was filed. The Court said (at p. 584):

> "*All that is beneficial in property arises from its use and the fruits of that use, and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession.* It is not necessary, in order to render a statute obnoxious to the restraints of the Constitution, that it must in terms or in effect authorize an actual physical taking of the property or the thing itself, so *long as it affects its free use and enjoyment, or the power of disposition at the will of the owner.* * * *
>
> "As the plaintiff in the case at bar was *virtually deprived of the right to build upon his lot by the statute in question, and as this circumstance obviously impaired its value and interfered with his power of disposition, it was to that extent void as to him*, and created no incumbrance upon it."

In *Allgeyer* v. *Louisiana*, 165 U. S., 578, this Court, speaking of a statute of Louisiana which prohibited the doing of any act in that State to effect insurance in a company which had not complied with the laws of that State, and which had been construed by the Supreme Court of Louisiana to apply to a contract made with a New York corporation by letter mailed in Louisiana, said (at p. 589):

> "As so construed we think the statute is a violation of the Fourteenth Amendment of the Federal Constitution, *in that it deprives the defendants of their liberty without due process of law.* The statute which forbids such act does not become due process of law, because it is inconsistent with the provisions of the Constitution of the Union. *The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person*, as by incarceration, but the term is deemed to *embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways;* to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose *to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.*"

And in reaffirming this doctrine, this Court said, in *Holden* v. *Hardy*, 169 U. S., 366, 391—

> "*As the possession of property*, of which a person cannot be deprived, *doubtless implies that such property may be acquired*, it is safe to say that *a State law which undertakes to deprive any class of persons of the* GENERAL POWER TO ACQUIRE PROPERTY *would also be obnoxious to the same provision.* Indeed, we may go a step further, and say that, *as property can only be legally acquired as between living persons by contract, a general prohibition against entering into contracts with re-*

spect to property, or having as their object the acquisition of property, would be equally invalid."

To the same effect is *People* v. *Gillson*, 109 N. Y., 389, in which the Court of Appeals of the State of New York (speaking through Judge PECKHAM) held invalid a statute prohibiting the sale or disposal of any article of food upon the inducement that some other article would be given with it as a gift, prize, or premium, on the general ground that it *interfered with the liberty of the citizen to use, sell and dispose of his property at will.*

Certainly, a *correlative* of the *right to acquire and use* property, during life, is the *right to dispose of it at death.* Both must be deemed natural rights in this present generation, whatever may have been true in the remote past (see *People* v. *Gillson*, 109 N. Y., at pp. 404; bottom—405). A citizen can no more be deprived of the latter than of the former. They must, *ex necessitate*, co-exist.

The fundamental right of the citizen, in respect to his property, to constitutional protection, under the Fourteenth Amendment, embraces, *as incident to the right of ownership*, the rights to *acquire*, to *sell* and to *give*, and the right to *give* is as complete, and stands on at least as high ground, as the conceded right to *acquire. It would be placing man on a very low plane, to hold otherwise—to regard him as a mere acquiring being, without the clear right suitably to dispose, at death and by his will, of what he has thus acquired.*

And it would likewise be *unjustifiable* to hold that the *gift* must not only be made, but take effect in enjoyment, *during life. There is no just or sound reason for any such limit.* The only needful thing to give effect to the exercise of the right, in such case, is, that the intent or will of the giver in respect of enjoyment *after his death*, shall be clearly made manifest in some appropriate way. *The*

right thus to give, to be enjoyed after the death of the giver, is general (subject of course to lawful restraint of improper gifts or gifts against public policy), but if there is such right of gift in general, *a fortiori*, must it exist in respect of such gifts to *wife and children* (here a *daughter*), where there is a moral *duty*, in fulfilment of which the gift is made.

Indeed—and this is a most significant fact—the very law of the State of New York now under review *groups and classifies together, without distinction, all gifts, whether inter vivos or after death*, and declares that the "transfer," referred to in the act is the—

> "passing of property, or any interest therein, in possession or enjoyment, present or future, by *inheritance, descent, devise, bequest, grant deed, bargain, sale or gift*" (Section 242).

The report of the case of *Magoun* vs. *Illinois Trust and Savings Bank*, 170 U. S.,283, shows that this proposition of the defendant in error, in denial of the natural right to give by will—that all property is *potentially the State's, as the heir of everybody*—or one substantially like it, was presented to the Court in that case. The Court did not render any decision upon it one way or the other. On page 288 of the report of this case we find the opinion of Mr. Justice McKenna. After referring to certain authorities he says:

> "It is not necessary to review these cases, or state at length the reasoning by which they are supported. They are based on two principles:
>
> 1. An inheritance tax is not one on property, but one on the succession.
>
> 2. The right to take property by devise or descent is the creature of the law, and not a natural right—a privilege and therefore the authority which confers it may impose *conditions* upon it. *From these principles it is*

> *deduced that the States may tax the privilege, discriminate between relatives* and between these and strangers, and grant exemptions; *and are not precluded from this power by the provisions of the respective State constitutions requiring uniformity and equality of taxation.*
>
> The *second* principle was given prominence in the arguments at bar. *The appellee claimed* that the power of the State could be exerted to the extent of *making the State the heir to everybody*, and the appellant asserted a natural right of children to inherit. *Of the former proposition we are not required to express an opinion. Nor indeed of the latter*, for appellant conceded that testamentary disposition and inheritance were subject to *regulation.*"

Doubtless, there are some dicta, and, perhaps, some authorities, which go as far or almost as far as the asserted proposition of our adversaries to which we have above referred, but there is no decision to any such effect by this Court, nor, we submit, any dicta, of any substantial materiality or importance on this question. There may have been, and we think there are, some dicta not at all material to the decision of the cases in which they were pronounced, which we are obliged, to some extent, to combat, but they are nothing more than dicta, and, not being at all necessary to the decision of the case in which they were uttered, it may be assumed had not been carefully considered by the judges uttering the dicta.

This case, as late as 1898, shows that *the question in this Court is entirely open.*

There are some dicta and some decisions of the Court of Appeals of New York on that subject which we have to combat vigorously. We believe this may be so in respect of some previous decisions of the Court of Appeals upon which the decision in the case at bar was expressly based. We do not deny that the opinion of the Court below, upon this particular question, is entirely adverse to us, and it

makes no practical difference whether that opinion of the Court below has been expressed in one case or in half a dozen cases or more. This being an appellate court for the purpose of reviewing the decisions of the Courts below, we are under no embarrassment because of the number of cases in which the adverse view has been taken.

In the case at bar, the judgment of the Court against us was expressly given upon the authority of the *Matter of Sherman*, 153 N. Y., 1. We therefore deal with the decision of the Court in that case exactly as if it were the decision in our case. There the Court, after laying down the extraordinary proposition that the immunity of the Federal borrowing power, and other constitutional functions, had been gradually *pared away* and materially beaten down, merely said, of this testamentary right, that it was subject to "*reasonable*" *regulation*.

The question, whether there is or is not a natural right in the owner of personal property to control the disposition and enjoyment of it subsequently to his death, is, to a certain extent, academic, yet not wholly so. There appears to be some difference of opinion upon this question among authors who have written in relation to it, some holding that there does exist a natural right in one's family or children to have the enjoyment of his property after his death, and others that there is not such right; and we must admit that it has been frequently *asserted* that the right in respect of the disposition of property of a decedent by testament or by distribution in case of intestacy is *purely the creature of municipal law and is not founded upon natural right*. We do not propose to enter into any very elaborate discussion of that question upon the basis of considering the views of different authors upon this subject, and the reasons they assign for their respective opinions. It seems to us that in order to ascertain *certain simple propositions in* relation to this subject, there is not needed any very

deep research or learned discussion, but merely the clear ascertainment of certain fundamental points which do not fairly admit of dispute, and thereupon the application to the determination of such points in relation to this question as are really material, of a moderate allowance of common sense; and we think it will be found upon fair examination that the differences in opinion upon these points which is found in different authors expressing variant opinions, may usually, or certainly often, be explained upon perceiving that they are really talking about different things.

The natural moral right of an individual to certain kinds of personal property acquired by certain methods seems to be too clear for reasonable dispute. If, for instance, in a nation which as yet has made very little, if any, advance towards civilization, a man becomes rightfully possessed of timber or lumber by felling trees, as to which his right is indisputable, and then by the work of his own hands he works the timber or lumber into boards, and therewith constructs a house or hut, which is not affixed to the ground so as to involve any question of ownership of the land, but is upon rollers or some such thing so as that it can be easily lifted off, and if then, with other lumber lawfully acquired he with his own hands constructs the rude furniture for the hut or house, and he occupies during his life with his wife and children this hut or house with its furniture, we cannot see on what basis it can be denied that this house or hut with its furniture is his own property, morally and of natural right, and as absolutely as could possibly be. It appears to be conceded that so long as he lives it is so; that the thing which he has constructed by his own labor is his and that no one else has any right whatever to or in respect of it. Then, it is said by some that immediately upon his death there ceases to be any right to or in respect of it belonging to him or to his family who were living in the house or hut with him up to his death,

notwithstanding he may have undertaken to give it to his family in his lifetime, and made such delivery of it as was possible in the nature of things; but that it all belongs to the State, or the community; as to which, it seems to us that it may be properly said, considering the question as one of natural and moral right, the assertion that the property has passed to the State, or the community, has no just foundation. But there is this one circumstance in relation to it, creating in a certain sense a difference between the *practical enjoyment* of the right in the lifetime of the man who actually created the property and *the practical enjoyment* of it by his wife and children after his death, which difference is this: That during his his life the property being his, if a marauder comes along and seeks to take the property he is on hand to fight the maurauder off; but after his death he is no longer there and if a marauder or marauders come along and seek to take away from his wife and children what he has undertaken to give to them for enjoyment after his death, manifesting his will in that respect as far as practicable, the wife and children being the only protectors of the property against the marauders, they by reason of weakness of sex of the widow and tender age of the children have not that practical force and power of protection which the necessities of the case require in order to prevent the rapacity of the marauders, and thus there is needed the help of some one else for the needed protection, and that some one else is found in the society of the fellows of the deceased man, who after some further progress in civilization came to be called the state, and from this necessity of seeking aid from others for the protection of the right to the property because of the natural owners, being incompetent to defend themselves, they naturally owe some compensation to the society or state which afforded them the requisite protection in the enjoyment of that to which they have a natural right but have not the requisite force for their

own adequate protection. And we suppose that in the rudest times some compensation in some respect may have been in some way afforded and that perhaps this, after civilization further advanced, may have been the origin of what is called the right of taxation. So that in fact, however it may have come about, it has come to be considered, that although there may be a natural right in, say, the wife and children, the effective protection of that right has to come from what has come to be called the State; and that therefore it has sometimes been said that the right of property after death is in the State; whereas really it is not the natural right to the property which the State has, but that the State has come to be the protector of that right, which position carries with it some rights in the community or the State in respect of the subject matter.

It seems to us, so far as we can see, impossible to deny that there is just as complete a natural right, say in the wife and children of a deceased barbarian to his hut and its rude furniture, if he has given it to them for enjoyment after his death, as there was in himself before his death. If the article in respect of which the question of natural right arises or is supposed in theory to have arisen, was of such portable character as that it was capable of manual delivery and it was so delivered by the man for good cause or consideration, say an hour before his death, can there be any doubt that the person to whom he thus delivered it, manifesting his will that such person should from and after the time of his death hold it instead of himself, was in respect of moral and natural right as much entitled to it as he was the moment before he gave it away? Now, when he was about to draw his last breath, had he not a *natural right* to give his chattels to his wife and children and make delivery as far as possible? Had any one else any right whatever to the chattels? It will be admitted that while he was alive and living in the house with his wife and children and making daily use of the house and furniture for the purposes of

their humble life, if any marauder or marauders should come along and take away the property they would be merely thieves or robbers. If a few days after death while his wife and family were in possession under the gift from the husband and father another set of marauders should come along and carry away by force the hut or house and furniture and leave the wife and children houseless, homeless and destitute, would it be any the less theft and robbery on the part of those marauders?

So, in another illustration, supposing in this barbarous condition of life a man slaying a wild beast, stripping it of its skin, makes out of the skin a garment for himself, and clothes himself with it thenceforth until the day of his death, and then he has a son grown up, of such age that the garment can fit him, or can be made to fit him, and he gives it to the son to be enjoyed by him after his death, upon his perceiving that in a few hours he will leave the earth. Would not the son's title to that garment be naturally and morally as just and as good as was the father's?

Then in respect of any such matters as this, where the original possessor who had acquired the property, by unquestionable right, and owned it in the sense that no one else had even any shadow of right to it, if it be admitted, as we think it must be, that as matter of mere natural right he could give the chattel away by making delivery of it, why did he not have the like natural right to provide on the eve of his departure from the world for the possession and enjoyment of that property, which was his own, by his wife or children or any one else to whom he might see fit to give it (taking care that he did no injustice to his wife and children), by manifesting in any appropriate way his will that such should be the ownership and enjoyment after his life of that which was his own? We speak now of the natural right in this respect, conceding that in a very rude state of the people

it might be necessary that there should be some protection of abstract rights of this character by some other force than was possessed by the donee of property of such description, and we do not at all dispute that there may exist under actual circumstances a certain power of control by society or what is called the state in respect of property which had belonged to a deceased person; but we think it is equally clear that this power of control and the necessity for it *is not exclusively confined to property of the dead, but that it may often be required for the protection of the property rights of living persons* in respect of property which they may have acquired originally by their own labor or in some other manner, other than what would now be called bequest from some one deceased.

If it is to be acknowledged or assumed that there was a natural right in an individual about to die to declare by manifestation in some manner of his will in that respect, who should be entitled to the possession or enjoyment after his death of property which was his, it might be requisite to have some sort of agreed regulation as to how this will of the owner, about to die, in respect of the subsequent enjoyment of his property, should be manifested. It might be needful before the invention of writing in any form or of its being known or used in the particular community, that in default of delivery of the property to the intended donee or distributee, there should be some authentic manifestation of the intent of the donor to make the gift or disposition. Before the invention and use of writing such a declaration in the presence of some specified number of credible witnesses might, perhaps, be regarded as a proper method of authentication. Then, when civilization had progressed so far as that the intention or will in respect of the property of the decedent could be manifested by writing, that would seem to be an appropriate method of

manifesting this intent to give in such form as that it should be regarded as authentic and form a proper evidence to the *quasi* public authorities whom we should now call the state, of the right of the donee or distributee to have and enjoy that property, and to call for the exercise of the power of the community or state for protecting him in its enjoyment, yielding always the proper tribute for that protection in the shape of taxes or otherwise.

Of course, we do not mean to say that the propositions which we have above stated are necessarily correct. They are merely off-hand suggestions which seem to us, to have some groundwork in common sense, and we give them for whatever they may fairly be worth, if anything.

But we think we may say that the question has become rather academic than otherwise.

When society had reached such a state of civilization as existed in England, say a thousand years ago, so that in some way or other there had grown up a recognized right, which we now call a common law right, substantially such as we have above shadowed forth as reasonable and proper in the nature of things, entitling the possessor of property to dispose of it by will operating after his death, such right was held to be legally operative in those days as fully as it is to-day. Under that state of things, may not the real explanation of the differences of opinion upon this abstract subject—this academic subject—among the persons who have written about it, be, that there always existed natural right, but at first not adequate means for protection of it, and that the adequate means for protection having come from the community called the State, it has come to be sometimes said, that *the right comes from* the State, because the State *regulates* it to a certain extent and protects it, while nevertheless the legal right was *founded in the beginning upon the inherent natural right of the individual to*

have that which is his own and dispose of it at his pleasure?

See the quotations from Chancellor KENT'S *Commentaries* under the preceding point (2 Kent's Com., 325 to 328).

But besides the right of disposing of personal property by will, there is another method by which a person owning such property may, in anticipation of death from some existing disease or impending peril, make a disposition of such property, to take effect upon such anticipated death, but to come back to him and remain his property in case of his recovery from the disease or escape from the impending peril. We refer to the well known *donatio causa mortis.*

We need not enlarge upon the nature or extent of this method of disposition, for the law on the subject is familiar. Many questions in relation to it have arisen in the State of New York and appear in our law reports. This right has existed in that State ever since it was transformed from a colony into a State, and it existed for a long time previous to, and up to, that time in England, and had been incorporated in and became substantially part of the common law of England, which was part of the law of this State before we separated from the mother country. The right seems to have been derived originally from the civil law. As far as our researches extend, there has never been any statute creating or defining this right either in England or in New York, and at this day it is a common law right and is very frequently exercised.

Blackstone says in respect to this right (Book II., p. 514, latter part of Vol. 1, Chitty's Blackstone) as follows:

"Besides these formal legacies contained in a man's will and testament, there is also permitted another death-bed disposition of prop-

erty; which is called a *donatio causa mortis*. And that is, when a person in his last sickness, apprehending his dissolution near, delivers or causes to be delivered to another the possession of any personal goods (under which have been included bonds and bills drawn by the deceased upon his banker) to keep in case of his decease. This gift, if the donor dies, needs not the assent of his executor, yet it shall not prevail against creditors, and is accompanied with this implied trust, that if he donor lives the property thereof shall revert to himself, being only given in contemplation of death or *mortis causa. This method of donation might have subsisted in a state of nature being always accompanied with delivery of actual possession, and so far differs from a testamentary disposition; but seems to have been handed to us from the civil lawyers who themselves borrowed it from the Greeks.*"

In substantial effect this method of disposing of property to a donee, to be enjoyed after the death of the donor, accomplishes the like result as a testamentary disposition and is of *the like nature in substance*, the difference being *mainly in the form of manifesting the will or intent* of the owner of the property.

We cite this passage from Blackstone *in confirmation of the proposition we have before advanced*, that in substance the possessor of personal property has a like *natural right* to make a disposition of it by will, to be enjoyed after his death and not before, as he has to make such a disposition in his lifetime to be enjoyed presently. We find this learned commentator on the laws of England stating that the right of disposition of personal property to take effect after death *might have subsisted in a state of nature because accompanied with delivery of actual possession.*

It is plain that in substance and effect the disposition of personal property by *donatio causa mortis* is the substantial equivalent of a disposition by testament; in either case the right of disposition rests

upon the ownership of the property by the donor or testator, and his right to do what he will with his own. The *only difference* between the two cases is in *the form* by which he manifests his intent or will to make such disposition. In the very rudest condition the writing which is necessary to the making of what we ordinarily call a testament might be unknown or almost unknown, and in such case the manifestation of the will of the owner for the enjoyment of the property after his death would be manifested by manual delivery of the subject matter. When there should have become a little further advance towards civilization and writings came into use for the disposition of property, the adoption of writings for the manifestation of the will of the owner in respect of the enjoyment of his property after his death, by what we now call a testament would be natural; and so we find that in the early days of Saxon England, it had come to be considered a matter of *common right* and was a *part of the common law* that an individual should have *a legal right* to dispose of his property by testament; but *this legal right was based upon the natural right which previously existed*, and had before been accustomed to be exercised by manifesting the will of the owner through the *donatio causa mortis* which Blackstone considers a natural right, or in some other substantially similar manner.

And here we call attention to the circumstance that from the very beginning in the State of New York of the practice of imposing taxation of the character of that which is now under discussion, *gifts causa mortis* as well as dispositions of property by *deed, grant, sale or gift of any kind*, made or intended to take effect in possession or enjoyment after the death of the grantor were *placed on the same footing* as dispositions of property or the passing of property by will or upon intestacy, the tax being imposed alike *on each and all of these different modes of disposition* (Tax Law of N. Y., § 242).

We notice, also, that this original act of the State of New York passed June 10, 1885, Chapter 483, Laws of 1885, appeared to treat the tax as *one upon property passing* by will or upon intestacy or by deed, grant, sale or gift made or intended to take effect in possession, as it declared in the first section that

> "*all property* which shall pass by will or intestate laws * * * or transferred by deed, grant, sale or gift * * * shall be and is subject to a *tax* of five dollars *on every hundred dollars of the clear market value of such property.*"

Thus treating the tax as one upon the property, as we insist it is in substance and effect. In saying this we do not mean to say that it is *a tax upon the mere ownership* of the property, but it is a tax upon an *ordinary incident of, or consequent upon, ownership.*

There were various alterations of this statute of 1885 prior to the year 1892. In that year the law of New York in relation to this kind of taxation was reconstructed and a new law passed April 30, 1892, Chapter 399, Laws of 1892. By the first section of this act a tax is imposed upon the transfer of property of the value of five hundred dollars or more in trust or otherwise, *first*, when the transfer is by will or by the intestate laws of this State, from any person being seized or possessed of the property while a resident of this State; *second*, when the transfer is by will or intestate law of property within the State and the decedent was a non-resident of the State at the time of his death; *third*, when the transfer is of property made by a non-resident *when such non-resident's property is within the State*, by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor, or donor, or intended to take effect in possession or enjoyment at or after such death.

Here the tax is declared to be imposed upon the transfer of the property whether by will or upon intestacy, or by gift or deed. It purports to cover not merely transfers of property by will or gift *causa mortis*, but likewise property transferred by deed, and in all cases the tax is imposed upon transfers of property in trust or otherwise. Under the latter clause of the third subdivision of this first section, the tax would seem to be imposed upon a person who, after the passage of the act, should become beneficially entitled, under the limitation of the trust deed, to the possession or enjoyment of the property, although the trust deed was made before the passage of the act.

Whether, under the view of our adversaries, the devolution of the title to the property of the donor or grantor, by means of gift *causa mortis*, or by means of a trust deed actually delivered, and vesting the title to the property in the trustee before the death of the decedent, but containing limitations of property beneficially, taking effect in enjoyment subsequently to such death, would be in the same category as a transfer of property *by means of a franchise or privilege*, as is claimed to be the case in respect of the devolution of title by will, or upon intestacy, we are not apprised; but we do not see that there would be, in reference to any question which is properly at issue in this case, any really substantial difference between the two cases, so far as concerns what we consider the imaginary franchise or privilege, and it would seem that the Legislature in passing the act did not assume that there was any such difference, for they *placed all these different modes of disposition on the same footing.*

It appears to us, though we do not undertake to say so positively, that the notion of the devolution of property in any of these modes being an act done in virtue of a special right or privilege, is rather *a new invention*, not in the mind of the Legislature when the first statute was passed, if it was when the statute of 1892 was passed. We do not

see how this notion of the right to make disposition of or to receive the benefit of the disposition of personal property by testament, or by gift *causa mortis*, or by trust deed, can be of any practical benefit or advantage to the State for any other purpose than that of possibly escaping what has been heretofore usually, or until recently, regarded as an absolute disability to impose taxes upon or in respect of United States bonds. In respect of anything else, as far as we can see, the right of the State to impose taxes of this nature stands upon like footing as its right to impose other taxes under the ordinary plenary powers of taxation which the States possessed before entering into the federal compact, and which were reserved to them by that compact, subject to certain exceptions, one of which was, the inability to tax directly or indirectly the loans to or indebtedness of the Government of the United States. We do not see that any of the reservations of the State's plenary powers of taxation *except that one* has any bearing on the taxation imposed by the so-called inheritance tax laws of this State, and we suppose that the State has—except in so far as restricted by the Federal Constitution or by general principles applicable to taxation in general—the right to impose direct taxes and duties and excises, which would embrace the right to impose this tax, commonly called the legacy, succession and inheritance tax, upon property, subject to its general powers of taxation, as the subject-matter of this controversy is *not*.

Sixth Point.

As to the authorities relied upon by the defendant in error.

Cases of a Franchise Tax.

We have now to consider certain authorities cited by our adversaries in relation to taxation imposed upon corporations in respect of their franchise rights or privileges, and the exercise of their rights under such franchises or privileges, and in respect of the effect or non-effect upon such taxation, of the circumstance that the corporation happens to hold United States bonds. It is upon these authorities that no small part of the contention of our adversaries rests.

The most important of these cases appears to be that of *Home Insurance Company* v. *New York*, 134 U. S., 594.

Upon the first argument of that case here, this Court was equally divided. The question being one of great importance the reporter has taken the very unusual course of reporting, in 119 U. S., 129, the facts of the case, and the arguments of the respective counsel at great length. Of course, he does not report the opinion of the Court, for there was none. In this respect the statement is:

> "Mr. Chief Justice Waite announced that the judgment of the Supreme Court of the State of New York was affirmed by a divided Court."

Afterwards a rehearing was granted and the case in 134 U. S. Rep. is a report of the rehearing.

The question in that case was, as to the validity of a tax imposed by the State of New York upon the Insurance Company under a statute which provided in the third section that every corporation of this particular character

"shall be subject to pay a tax, *as a tax upon its corporate franchise or business*, into the Treasury of the State, annually, to be computed as follows: If the dividends declared by the corporation during the current year should amount to six per cent. or more upon the par value of its capital stock, the tax should be *at the rate of* one-quarter of a mill upon the capital stock *for each one per cent. of the dividend*, and in case there were not dividends amounting to as much as six per cent., then the tax should be at the rate of one and a half mill upon each dollar of the valuation of the capital stock made in accordance with the provision of the first section of the act."

The Home Insurance Company was a domestic fire insurance company; its capital stock was $3,000,000 divided into 30,000 shares of $100 each, all full paid. During the current year its dividends amounted to ten per cent. During the current year the company had part of its capital invested in United States bonds, which by the Act of Congress under which they were issued were exempted from State taxation. At the beginning of the year it held such bonds of the par value of $3,300,000, and when the last dividend was declared it had such bonds of the par value of $1,940,000. The company tendered payment of a tax at the rate of one and a quarter per cent. upon the sum of $1,060,000, that being the amount of the par of its capital stock after deducting the par value of the United States bonds, which it held at the time of the last dividend, and when the report of valuation was made.

The opinion of the Court upon rehearing was delivered by Mr. Justice FIELD, and will be found on pages 597 to 607. In this opinion the Court say (pp. 597-8):

> "*The contention of the plaintiff in error is that the tax in question was levied upon its capital stock, and therefore invalid, so far as the bonds of the United States constitute a part*

of that stock. If that contention were well founded, there would be no question as to the invalidity of the tax. That the bonds or obligations of the United States for the payment of money cannot be the subject of taxation by a State is familiar law settled by numerous adjudications of this Court. It is a tax upon the exercise of the power of Congress to borrow money; a tax, which, if permitted, could be limited in amount only by the discretion of the State, and might, therefore, be carried to an extent impairing, if not destructive of, the efficiency of the power to the serious detriment of the general government. As held in *McCulloch* v. *Maryland*, 4 Wheat., 316, 436, *the States have no power by taxation to impede, burden or in any manner control* the operation of the Constitution and laws enacted by Congress to carry into execution the powers vested in the general government; a doctrine which, applied in *Weston* v. *City Council of Charleston*, 2 Pet., 449, annulled a tax levied by the authority of a law of South Carolina on stock issued for loans to the United States.

Nor can this inhibition upon the States be evaded by any change in the mode or form of the taxation, provided the same result is effected—that is, an impediment is thereby interposed to the exercise of a power of the United States. That which cannot be accomplished directly cannot be accomplished indirectly. Through all such attempts the Court will look to the end sought to be reached, and if that would trench upon a power of the government, the law creating it will be set aside or its enforcement restrained. Thus in *Henderson* v. *Mayor of New York*, 92 U. S., 259, 268, a statute of New York provided that the master or owner of any vessel bringing passengers from foreign ports into the port of New York should give a bond in the sum of $300 for each passenger landed, against his becoming a public charge for four years thereafter, or pay within twenty-four hours thereafter one hundred and fifty dollars for each passenger; and that, if neither bond was given nor payment made, a penalty of $500 for such failure would be incurred,

which should be a lien upon the vessel. *It was contended* that the object of the requirement was not taxation, *but protection against pauperism*, and therefore *valid as within the police power*. But the Court said that *in whatever language the statute may be framed its purpose must be determined by its reasonable and natural effect*, and judged by that criterion the tax was either on the owners of the vessel for the right of landing passengers or upon the passengers themselves; and that therefore the statute was a regulation of commerce and void.

To the same purport is the familiar case of *Brown* v. *Maryland*, 12 Wheat., 419, so often cited in this Court, *where it was contended that a license tax required of an importer to sell his goods*, while held in bulk as imported, *was a tax only upon his occupation*. But *the Court* observed *that this was only changing the form without varying the substance of the tax, adding that 'it is treating a prohibition which is general as if it were confined to a particular mode of doing the forbidden thing*. All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself.'

Looking now at the tax in this case upon the plaintiff in error, we are unable to perceive that it falls within the doctrines of any of the cases cited, to which we fully assent, not doubting their correctness in any particular. It is *not a* tax in terms *upon the capital stock* of the company, *nor upon any bonds of the United States composing a part of that stock*. The statute *designates* it a tax upon the '*corporate franchise or business*' of the company, and reference is only made to its capital stock and dividends for the purpose of determining the amount of the tax to be exacted each year. By the term 'corporate franchise or business' as here used we understand is meant (not referring to corporations sole, which are not usually created for commercial business) the right or privilege given by the State to two or more persons of being a corporation, that is, *of doing business in a corporate capacity*, and *not the privilege or franchise which, when, incorporated, the company may exercise*. The

right or privilege to be a corporation, or to do business as such body, is one generally deemed of value to the corporators, or it would not be sought in such numbers as at present. It is a right or privilege by which several individuals may unite themselves under a common name and act as a single person, with a succession of members without dissolution or suspension of business *and with a limited individual liability. The granting of such right or privilege rests entirely in the discretion of the State, and, of course, when granted, may be accompanied with such conditions as its Legislature may judge most befitting to its interests and policy. It may require*, as a condition of the grant of the franchise, and also of its continued exercise *that the corporation pay a specific sum to the State each year, or month, or a specific portion of its gross receipts or of the profits of its business, or a sum to be ascertained in any convenient mode which it may prescribe.* The validity of the tax can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount for any year *which it will exact for the franchise.* No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows, * * * As was said in *Delaware Railroad Tax Case*, 18 Wall., 206, 231, 'The State may impose taxes upon the corporation as an entity *existing under its laws* as well as upon the capital stock of the corporation or its separate corporate property' * * * It is true, as said by this Court in *California* v. *Pacific Railroad Co.*, 127 U. S., 141, that *the taxation of a corporate franchise has no limitation but the discretion of the taxing power, and its value is not measured like that of property, but may be fixed at any sum that the legislature may choose; it may be arbitrarily laid, without any valuation* put upon the franchise. * * * The tax in the present case *would not be affected*, if *the nature of the property* in which the whole capital stock is invested *were changed and put into real prop-*

> *erty* or bonds of New York, or of other states. *From the very nature of the tax*, being laid upon a franchise given by the state, and revocable at pleasure, *it cannot be affected in any way by the character of the property* in which its capital stock is invested."

The Court then refers to a case in the New York Court of Appeals, *Monroe Savings Bank* v. *City of Rochester*, 37 N. Y., 365, 369-370, and quotes a portion of the opinion in that case, as follows:

> "'It is true that where a state tax is laid upon the property of an individual or a corporation, so much of their property as is invested in United States bonds is to be treated, for the purposes of assessment, as if it did not exist, *but this rule can have no application to an assessment upon a franchise, where a reference to property is made only to ascertain the value of the thing assessed.*' And again: 'It must be regarded as a sound doctrine to hold that the State, in granting a franchise to a corporation, may limit the powers to be exercised under it and annex conditions to its enjoyment, and make it contribute to the revenues of the State. If the grantee accepts the boon, it must bear the burden.'"

This Court, in the *Home Insurance Co. case* then proceeds to say:

> "This doctrine of the taxability of the franchises of a corporation without reference to the character of the property in which its capital stock or its deposits are invested is sustained by the judgments in *Society for Savings* v. *Coite*, 6 Wall., 594, and *Provident Institution* v. *Massachusetts*, 6 Wall., 611, which were before this Court at December Term, 1867."

He then proceeds to analyze those cases, but we will not advert particularly here to such analysis because we propose to comment upon those cases in

another part of this brief. Then (on pp. 605 and 606) the Court says:

> "In *Hamilton Company* v. *Massachusetts*, 6 Wall., 632, a statute of Massachusetts which required corporations having a capital stock divided into shares, to pay a *tax of a certain percentage upon the excess of the market value* of such stock over the value of its real estate and machinery, was sustained as a statute imposing a franchise tax, notwithstanding a portion of the property which went to make the excess of the market value consisted of securities of the United States; *this Court, however, placing its decision upon the fact that under the provisions of the State Constitution and the practice under it the tax had been so considered by the highest tribunal of the State.* This decision goes much farther than is necessary to sustain the judgment of the Court of Appeals of New York in the present case."

And then the Court adds:

> "In this case we hold, as well upon general principles as upon the authority of the *first two cases cited from 6th Wallace*, that the tax for which the suit is brought is not a tax on the capital stock or property of the company, but upon its corporate franchise, and is not therefore subject to the objection stated by counsel, because a portion of its capital stock is invested in securities of the United States."

It must be noted that this Court, while *recognizing the authority of the first two cases cited, carefully avoids recognizing the authority of the third case of the Hamilton Company* v. *Massachusetts*, 6 Wall., 632, inasmuch as that decision had not been made upon the basis of general principles, but upon the construction placed upon Massachusetts laws by the Supreme Court of that State.

From this opinion in the *Home Insurance Co. case*, Mr. Justice MILLER and Mr. Justice HARLAN

dissented. In expressing such dissent Mr. Justice MILLER said:

> "Mr. Justice HARLAN and myself dissent from the judgment in this case, because we think that, notwithstanding the peculiar language of the statute of New York, the tax in controversy is *in effect a tax upon bonds of the United States held by the insurance company.*"

We now proceed to analyze the cases in 6th Wallace referred to in the opinion in the Home Insurance case as just mentioned.

In the case of *Society for Savings* v. *Coite*, 6 Wall., 594, the question was raised upon the statute of the State of Connecticut providing that savings banks in that State should *make annual return* to the Comptroller of the total amount of *all deposits* in them respectively on the first day of July in each year, and that each should annually pay to the treasurer of the State *a sum equal to* three-fourths of one per cent. *on the total amount of such deposits*, which tax the statute declared should be in lieu of all other taxes upon savings banks or their deposits. This savings bank had invested a certain portion of its funds in hand, which had arisen from the deposits which it had received, in the purchase of United States bonds, which had been declared by Congress under the law of their issue, to be exempt from State taxation, and the savings bank, on making return of the amount of deposits, claimed that it was entitled to deduct from such amount, in the computation of the amount payable under the tax of three-fourths of one per cent. upon a sum equal to the total amount of deposits, the amount which *it had invested* in the purchase of United States bonds.

The opinion of the Court delivered by Mr. Justice CLIFFORD rejected this claim of the savings bank and held that the tax was properly assessable upon *an amount equal to the sum total of the deposits re-*

ceived, without reference to the manner in which the corporation might have chosen to invest its funds derived from the deposits. After fully *recognizing that, if the tax in question were to be viewed as a tax on the property of the bank*, it would be illegal so far as respects the amount invested in United States bonds, the Court proceeds to say (pp. 605 and 606):

> "None of these principles are denied by the original plaintiff. On the contrary he admits that the States do not possess the power, by taxation or otherwise, to retard, impede, burden or in any manner to control the operation of the constitutional laws passed by Congress to carry into execution the powers vested in the Federal government. Conceding all this, he still denies that the tax in this case is in any proper sense subject to any such objection, but insists that in any and every point of view *it is a tax on the privileges and franchises of the defendant corporation, which was created by the Legislature of the State*, and which by all the authorities, it is entirely competent for the State to tax, with the other property of the citizens, for the support of the State government. * * *
>
> Unless exempted in terms which amount to a contract, the *privileges and franchises of a private corporation are as much the legitimate subject of taxation as any other property* of the citizens which is within the sovereign power of the State. * * *
>
> *Corporate franchises are legal estates vested in the corporation itself* as soon as it is *in esse*. They are not mere naked powers granted to the corporation, but powers coupled with an interest which vest in the corporation upon the possession of its franchises, and whatever may be thought of the corporators, *it cannot be denied that the corporation itself has a legal interest in such franchises.*
>
> Nothing can be more certain in legal decision than that *the privileges and franchises of a private corporation*, and all trades and avocations by which the citizens acquire a

livelihood, may be taxed by a state for the support of the state government. * * *

Views of the defendants are, that the sums required to be paid to the treasury of the State is a tax on the assets of the institution, but there is not a word in the provision which gives any satisfactory support to that proposition."

The *substance of the decision* is that the tax in question is a tax upon *the franchises and privileges of the corporation itself*, this amount *being measured by the amount of the deposits*, and it is not in any sense a *tax on any property other than the franchise.*

On reference to the facts of the case, it will be perceived that *not only* was there *no taxation of the corporate property other than the franchise*, but *such property was not at all referred to by way of measure for valuation of the franchise*, the references for *such measure* being to the amounts of the deposits, which after they were made *constituted not assets but liabilities* of the corporation. They might well be referred to as exhibiting *the extent of the business done in exercise* of the franchise during the year.

From the judgment rendered in this case, three members of the Court, namely, the Chief Justice and Justices GRIER and MILLER, dissented on the ground that the tax was a tax on the property and not upon the franchise and privileges of the plaintiff in error.

The next case we have to analyze is that of *Provident Institution* v. *Massachusetts*, 6 Wall., 611.

That case was very similar to the one last mentioned. There was a statute of Massachusetts imposing upon this Provident Institution, which was substantially a savings bank, an annual tax, on account of its depositors of one half of one per cent. on the amount of its deposits. The bank having invested in United States bonds, exempt by the law of the United

States from taxation by State authority, an amount equal to about one-sixth of the amount of the deposits, insisted that, in the *computation of the one-half per cent. of the deposits* for the purpose of taxation, the amount so invested in United States bonds should be excluded. The Supreme Court of Massachusetts rejected this claim of exemption from taxation, and, upon writ of error, this Court affirmed the decision of that Court, the opinion of the Court being delivered, as in the last preceding case, by Mr. Justice CLIFFORD, and the Chief Justice and Justices GRIER and MILLER dissenting in this case as they did in that. An examination of the opinion of the Court will show that the judgment was placed distinctly upon the ground that *the tax was not a tax upon property, but a franchise tax.* We need not go over in detail the opinion, which is of considerable length, but we will quote two clauses.

On page 630 the Court said:

> "*Considered as a tax on property, no part of the tax could be supported under* the Constitution of the State, and there never was a moment when such a tax, if viewed as a property tax, could be upheld, since the State was organized under a written Constitution. The amount of the tax does not depend upon the amount of the property held by the institution, but *it depends upon the capacity of the institution to exercise the privileges conferred by the charter.*
>
> *Valuation of property has nothing to do with determining the amount of the tax, but the amount depends on the average amount of the deposits* for the six months preceding the respective days named, and it is quite obvious that there is no necessary relation between the average amount of the deposits and the amount of the property owned by the institution. *Granting that it is not a property tax, then it must be considered as a franchise tax laid upon the corporation for the privileges conferred by the charter,* which, by all the authorities, it is competent for the State to tax, irrespective of what disposition the institution has made of the funds, or in what manner they may have been invested."

The next case to be considered is *Hamilton Company* v. *Massachusetts*, 6 Wall., 632.

The Hamilton Company was a manufacturing corporation. A statute of Massachusetts required a return by the assessors of the towns of the value of the real estate and machinery for which the corporation was taxed in the towns. The corporation was required to make an annual return of the amount of its capital and its par value and the cash market value. Then a Board of Commissioners was to ascertain *the excess of the market value* of all the capital stock of such corporation over the value of the real estate and machinery. The corporation was required to pay to the State a tax of one and one-sixth per cent. *upon such excess*. It appeared, upon the return made in pursuance of the statute, that there were certain amounts of real estate and machinery for which the tax was imposed in the town, and that there was a certain ascertainment of the cash market value of the stock of the corporation. It likewise appeared that, in addition to the real estate and machinery, the corporation owned some other assets standing on their books for a certain amount, and likewise $300,000 of United States bonds, which it was conceded were exempt from State taxation. There were several questions discussed in this case, arising under the State laws of Massachusetts, and it would seem, from the report of the case, that to some extent, but it does not seem very easy from the report to ascertain to what extent, the value of the United States bonds entered into the assessment of the one and one-sixth per cent. tax, payment of which was demanded, and to some extent refused by the corporation. The only point in the case with which we have any concern is the question whether this tax was a tax upon property, or a tax on the franchises and privileges of the corporation. The decision of this Court, as declared by Mr. Justice CLIFFORD, was, that this was *a tax upon the franchise*

and not upon the property, and that, therefore, the decisions in the two savings bank cases, to which we have just adverted, were applicable and controlling. From this judgment, the Chief Justice and Justices GRIER and MILLER dissented, as they had done in the two previous cases.

The decision of this case in the court below would seem to have been based, to some extent at least, upon the construction to be given to certain provisions of the Massaccusetts law, as to which there was controversy, and this Court would seem to have held that the decision of the State court in this respect was binding upon them, inasmuch as they held that the case did not in this respect involve any Federal question under the Judiciary Act. As Mr. Justice FIELD, in his opinion in the *Home Insurance Company case*, appears to have regarded this case of the *Hamilton Company*, at least in some respects as an adjudication of the Massachusetts Court, not properly subject to review in this Court, and, therefore, *declined to regard it as one of the authorities* upon which the judgment in the *Home Insurance Company case* was based, it does not seem to us needful that we should spend any more time in the examination and critical discussion of it.

Turning now, again, to the consideration of the *Home Insurance Company case*, we have these further remarks to make:

The decision subjecting the Home Insurance Company to this tax was placed upon the precise ground that it was *not at all a tax upon the corporate stock of the company, nor upon any United States bonds, nor upon any other particular thing composing a part of the capital stock;* that the *statute designated it* as a tax upon the *corporate franchise or business*, and that so in fact it was; that the right or privilege to be a corporation, or to do business as such body, is one generally deemed to be of value to the corporation; that it is a right or privilege by which several in-

dividuals may unite themselves under a common name and act as a single person, with a succession of members, without dissolution or suspension of business, and with a *limited indivdual liability;* that the granting of such a right or privilege, resting entirely in the discretion of the State, it might, of course, when granted, *be accompanied with such conditions as the legislature might judge most befitting its interests* and policy; that the State might require, *as a condition of the grant of the franchise, and also of its continued exercise, that the corporation pay a specific sum to the State each year or month,* or a specific portion of its gross receipts, or of the profits of its business, *or of a sum to be ascertained in any convenient mode which it may prescribe; that the validity of the tax can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount,* for any year, which it will exact for the franchise; that no constitutional objection lies in the way of a legislative body prescribing *any mode of measurement to determine the amount it will charge for the privilege it bestows;* and that the reference made by the statute to the capital stock and dividends was merely by way of fixing a measure for determining the amount of the tax to be exacted.

The great practical advantages of the corporate franchise in the case of a fire insurance company, such as the Home Insurance Company, of one of the incidents of the franchise, namely, the *limited individual liability,* is very striking, and would alone give ground for a large tax on the franchise. Such a corporation is engaged in a business of peculiar hazard. It has in its outstanding policies contingent liabilities of immense amount in comparison with its capital and surplus. We suppose much more than one hundred times as great usually. In a long course of prosperous years it may and often does make profits great enough to enable it to return to its stockholders in dividends much more than the amount of their orig-

inal investments in the stock, with compound interest upon it. And, if then, as sometimes happens, some great disaster, such as the great fire in New York in 1835 or the great fire in Chicago in 1871 or some long continued run of ill luck, reduces the corporation to insolvency, so that after exhaustion of all its assets there is a large deficiency owing to the creditors, *the exemption of the shareholders from individual liability*, which is part of the corporate franchise, relieves the shareholders from liability for such deficiency and leaves it to be borne by the creditors.

Now, with reference to the point that where the capital of this company was to be referred to with reference to fixing the amount of the franchise tax, the circumstance that part of the capital was invested in non-taxable United States bonds was disregarded, we have to remark that there was nothing unfair or unreasonable in such disregard of that circumstance. *Even in case of a corporation which by act of the Legislature is obliged to pay a tax of a fixed percentage upon the amount of its capital as such*, there might be nothing unfair in entirely disregarding, in the imposition of such tax, the circumstance that any particular portion of the capital, however large in proportion to the whole amount, *is invested in non taxable subject matters.* It is perfectly competent for the Legislature to prescribe in the charter of a corporation with a capital of say $500,000, with liberty to commence business whenever $100,000 shall be paid in, and continue that business and forbear to call in the other $400,000 as long as it may choose to do so, that it shall pay tax upon the amount of the capital which it is *authorized* to have, so that upon the assessment of a direct tax upon its capital it would pay upon five times its actual amount. It would do so, because it was an artificial being created by the State, and because such was the *law of its creation.*

A case arose in the State of New York many years ago in which a corporation was chartered with a capital of $2,000,000, and it had actually lost beyond recovery—nearly *one-half that* capital. It was taxed nevertheless, for the *regular State, city and county tax of New York*, upon the full amount of the capital which it originally had, in entire disregard of the circumstance that nearly half of it was lost and gone forever. There was a litigation on the subject carried through our courts up to the court of last resort, the corporation seeking to escape the taxation upon what it regarded as imaginary capital, as in truth it was, but it had no success in the contention. It was held to pay the tax upon the capital which it once had and had lost. Is compelling it to pay tax upon such portion of its capital as it has invested in untaxable subject matters any more onerous than that, or does it differ in character?

Farmers' Loan & Trust Company vs. *The Mayor*, &c., *of New York*, 7 Hill, 261.

This, naturally, brings us to the following proposition which we assert with confidence:

All these cases in relation to the taxation imposed by a State upon its corporations, *artificial beings of which it is the creator* and over which it has on the creation absolute authority - are inapplicable in respect to the exactions by the State *upon natural persons whose creator it is not* and who are subject to no such despotic or absolute authority as are the artificial beings. This taxation which was imposed by the State upon the Farmers' Loan and Trust Company which it had created upon property which it once had and had lost, was all well enough; it was in pursuance of the conditions upon which it had conferred the franchise.

But what would be thought of a tax imposed by a State upon a natural person, upon the property which he had ten years before but had unfortunately

lost? No one would say otherwise than that a claim to impose such a tax upon a natural person was simply absurd.

We find in the brief of our adversaries in this case in the court below immediately following the citation of certain cases, which have been called the Franchise Tax Cases, including the *Home Insurance Company case* and the two cases in 6th Wallace, to which we have before adverted, the following proposition in substance of our adversaries:

> "The same statement that the price of the bonds would be reduced, and thus the borrowing power of the United States would be affected, could with equal justice be made in these cases, and was in fact made by counsel, because the banks or corporations would not pay as much for the bonds if they knew their value could be included in determining the value of the franchises or privileges conferred; nevertheless, the Supreme Court has held rightly there was no objection to so doing."

In answer to this argument of our adversaries we have to say:

The supposed possible effect upon the borrowing power of the United States, of the circumstance to which the argument of our adversaries refers is exceedingly remote. It has no reference to any action of a natural person, but is limited to the possible action of certain artificial beings created by the State, in respect of which it may be said, that the State creating such artificial being had a clear, absolute right upon the grant of the corporate privilege or franchise, to impose such conditions and restrictions as it might see fit. In granting a charter to a savings bank or insurance company the State unquestionably might for the protection or in the interest of the depositors in the savings banks or the policyholders of the insurance company, or upon any grounds of public policy or otherwise which the State should consider properly applicable, regulate the investments which the savings bank or the insur-

ance company should be authorized to make *either of its capital or its surplus funds* in *such manner as the States should see fit*. It might provide that *such investment should be made only in bonds and mortgages upon property in the particular State in which the corporation was located*, the consequence of which lawful provision would doubtless be *to shut out any investment in United States bonds* or *in anything else other* than the prescribed bonds and mortgages on property in the particular State. The State might well have chosen to limit the investment to bonds and mortgages of the specified character, *not* because they were better security than United States bonds (as of course they would not be), or than some other particular subjects of investment, but because they would afford a much higher interest, which, at least to the depositors in the savings bank, would certainly be a matter of very considerable interest, and even to the policyholders and stockholders of insurance companies it might have a value, as having a tendency by means of *greater profit or return of income from investments* to reduce the rate at which the company could afford to insure; or the regulation and exclusion or limit might be made from any other motive which the State might consider expedient, as to which the Courts could rightfully have no possible right to say nay.

Certainly the State would be under no obligation *in creating an artificial being to furnish thereby bidders for United States Loans* and, *a fortiori* would it be under no obligation to maintain the existence of, or refrain from destroying, such artificial creatures of its own creation, though thereby the number of bidders for United States bonds might be lessened; when, instead of destroying, it levies a tax upon the right of such creations of its own to exist, it does not, any more than in case of the destruction of such creatures, impose a burthen upon Federal securities by burdening or lessening the market for them.

While the Court held in the *Home Insurance case* that the reference is to the amount or value of the entire property of the corporation irrespective of the character of the investments which might have been made of it, not for the purpose of taxing the property, but merely by way of measure in fixing the amount of a tax upon the corporate franchises, was not an infraction of the Constitution of the United States, it was careful to say, at the same time, and in the same opinion, that if this had been a tax upon the property of the corporation which had been in part invested in United States securities, such tax, in so far as it included the value of the United States securities, would have been an infraction of the Constitution.

We thus see very plainly the exceeding remoteness of this proposition of the learned counsel on the other side, in their brief in this case, and if, as they say, some such proposition was stated, in the cases cited, by some of the counsel *arguendo*, it seems to be clear that the Court did not consider it of consequence enough to mention it at all in the opinion. At the utmost, any suggestion of such effect would be of a remote possibility, limited to artificial beings created by the State and would have no application when consider ing the case of natural persons who would be or might be lenders when the Government might seek to negotiate a loan.

The creation of these artificial beings is purely the action of the State and their continuance depends upon the will of the State. *The United States has no right to require either their creation or their continuance with a view to furnish bidders for their loan.* The tax on the franchise is on the continuation of the existence of this artificial being created by the State.

We have further to say, by way of answer to the last above quotation from the brief of our adversaries in the Court below, in which they claim some effect upon the price of United States bonds and thus upon the borrowing power of the United States aris-

ing as the result of the decisions of the Court in these franchise tax cases, and likewise in answer to all other allegations of our adversaries of kindred character, that all arguments which liken the position of these artificial beings, corporations, to the position of natural persons in respect of the questions which are substantially in controversy here, proceed upon the entirely erroneous basis of treating things or persons which are essentially and entirely different as if they were alike. To follow out in detail all the results which would follow from the confounding of these two things, so essentially different, would require more time and trouble than can well be spared in the preparation of this brief, which is to be filed within a specified period prior to the argument. Suffice it to say, that there is this vital difference between the individual and the corporation, that the individual exists and carries on his operations under natural power and of common right, while the corporation is an artificial being, created by the State and dependent upon the State for the continuance of its existence, and subject to regulations, and to the imposition of burdens upon it, by the State, not at all applicable to natural persons.

And with reference to the above quoted argument, contained in our adversaries' brief below, it may be specifically said that the consideration as to the alleged similar or kindred burden of a franchise tax, so urged by our adversaries, would be applicable only in respect of a very *limited number of corporations*, legally subjected to such a franchise tax, irrespective of all property tax, *and, in that case, even, only remotely*, while, if such argument were applicable to the case at bar, as to the burden of this transfer tax, the application would be to *every natural person*, throughout the length and breadth of this land, who might be a lender or possible lender, to the Government, and that application and the burden and the tax would be, *not circuitous*, but *direct*.

U. S. *v.* PERKINS, 163 U. S., 625; MAGER *v.* GRIMA, 8 HOW., 490, AND OTHER AUTHORITIES.

With reference to the case of *United States* v. *Perkins*, 163 U. S., p. 625, which is very much relied upon by our adversaries, we have this to say:

So far as respects the question at issue in this case, the portion of the opinion in the *Perkins case* on which our adversaries rely, is merely a dictum which when uttered *had no reference or intended reference to any question of taxation of the borrowing power of the United States under the Constitution.* No such question was in any way involved in that case, nor can it be presumed, nor is it in the least degree likely, that any such question was at all in the mind of the Court or of the Justice uttering this dictum, when it was uttered.

This Court's views of *dicta* are well understood.

Pollock v. *Farmer's Loan & Trust Co.*, 157 U. S., at pp. 574-5.

The question in the *Perkins case* was, whether a bequest made by the will of one Merriam, a citizen of New York, of personal estate, to the United States, was subject to a legacy or inheritance tax under the laws of New York. That, as Mr. Justice BROWN said in his opinion in this *Perkins case*, involved two questions, *first*, whether it was within the power of the State to tax the bequest to the United States; and second, whether under the New York statute the United States was a corporation exempted by such laws from such taxation. The case did not involve any question in relation to disposition by will of United States bonds. There is nothing to indicate that the testator held any such bonds. As to the *second* question, the Court held, in accordance with rulings which had been made by the State court in other cases, that the United States was *not* a domestic corporation and was not within the exception of the State statute. As to the *first* ques-

tion, the contention on behalf of the United States was that it was an attempt to tax the property of the United States, and in respect of that question this Court, after citing several cases, almost all of which are in State courts, and some of which are to the substantial effect that a tax of this character is a tax not upon the property but upon its transmission by will or upon intestacy, disposes of the matter as follows (p. 630):

> "We think that it follows from this that the act in question *is not open to the objection that it is an attempt to tax the property of the United States*, since the tax is *imposed upon the legacy before it reaches the hands of the Government*. The legacy *becomes the property of the United States only after it has suffered a diminution to the amount of the tax*, and it is only upon this condition that the Legislature assents to a bequest of it."

Upon this assumption of the effect of the bequest contained in the will, the point that the United States, the legatee, has an immunity from taxation is perceived to be immaterial, because the legacy is held to be, not of the gross original amount of property, but only of so much of it as should be left after taking out the tax. With the correctness of the view thus taken by the Court of the substantial effect of the bequest we have no concern. It will be seen that all the Justices of the Court, except Mr. Justice HARLAN, concurred in the opinion, and it must be assumed for the purposes of the authority of this *Perkins case*, in discussion of the points arising in the case at bar, that this conclusion as to the limitation of the amount of the bequest is a legitimate construction of the will under the circumstances. If the testator in making the bequest had said in express terms what this Court declared to be the legal effect of the bequest under the circumstances, namely, that he gave the property to the United States after first paying thereout to the State the

amount of the tax provided to be paid in respect of it by a statute of the State particularly mentioned in the will, it would be too clear for dispute that the question of the immunity of the United States from taxation of its property by the State was not at all involved.

We do not propose to criticise in detail the decisions of State courts having a bearing upon the questions under discussion in this case. We admit that some of those State decisions, not only in New York, but in other States, are adverse to our contention. In our view they are decisions of State courts in favor of the right of States in substance and effect to tax the borrowing power of the United States, in disregard, as we think, of the doctrine laid down by this Court in its opinion delivered by Chief Justice MARSHALL, in the *Charleston case*, seventy years ago, and which has ever since been steadily adhered to by this Court whenever the question has come before it. The object of this appeal is to have these adverse decisions of the State courts in favor of assumed rights of the States, reviewed by this Court, which is the constituted guardian of the rights of the United States as well as the rights of the States.

The only case *in this Court* cited in the opinion in the *Perkins case* is that of *Mager* vs. *Grima*, 8 How., 490, 493, to which we shall hereafter refer. The portion of the opinion of Mr. Justice BROWN in the *Perkins case* referred to in the brief of our adversaries in the Court below, and which we therefore assume will be the portion of that opinion relied upon here, is as follows:

> "While the laws of all civilized states recognize in every citizen the absolute right to his own earnings and to the enjoyment of his own property, and the increase thereof, during his life, except so far as the State may require him to contribute his share for public expenses, the right to dispose of his property by will has always been considered *purely a*

creature of statute and within legislative control. * * *

"In this view, the so-called inheritance tax of the State of New York is in reality a limitation upon the power of a testator to bequeath his property to whom he pleases; a declaration that, in the exercise of that power he shall contribute a certain percentage to the public use; in other words, that the right to dispose of his property by will shall remain, but subject to a condition that the State has a right to impose. Certainly, if it be true that the right of testamentary disposition is *purely statutory*, the State has a right to require a contribution to the public treasury before the bequest shall take effect. Thus the tax is *not upon the property, in the ordinary sense of the term*, but upon the right to dispose of it, and it is not until it has yielded its contribution to the State that it becomes the property of the legatee. * * * This, therefore, is not a tax upon the property itself, but is merely the price exacted by the State for the privilege accorded in permitting property so situated to be transferred by will or by descent or distribution. * * * Such a tax was also held by this Court to be free from any constitutional objection in *Mager v. Grima*, 8 How., 490-493, Mr. Chief Justice Taney remarking that 'the law in question is nothing more than an exercise of the power which every State and sovereignty possesses, of regulating the manner and terms within which property, real and personal, within its dominion may be transferred by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it. * * * If a State may deny the privilege altogether, it follows that when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy,"

We submit that upon assumption of the correctness of the conclusion finally reached by the Court as to the extent and effect of the bequest made by

Merriam, the testator, to the United States, namely, that the bequest was merely of the residuum after the subtraction of the amount of the tax, the authorities cited and most of the propositions in the opinion of Mr. Justice BROWN which are above quoted were not necessarily involved in the decision of the case, and should therefore be regarded as *dicta*.

It is quite clear, we think, that whatever discussion there was in this *Perkins case* in relation to the claimed exemption of the United States from the taxation there in question, *was not a discussion in respect of the right of the United States to be exempted from interference by any of the States, whether directly or indirectly, and whether by execution of the State's power of taxation or otherwise, with any of the powers granted to the United States by the Constitution*, or with any action of the United States in the execution of those powers.

Whatever right the United States had or now has to receive and take the benefit of voluntary gifts made, whether by will or by gift *inter vivos*, was not and is not a right expressly conferred by the Constitution in any way, nor a right in any wise necessary to the execution of any of its governmental powers, nor in any wise requisite for the fulfillment of any of its governmental duties.

In the case of *United States* v. *Fox*, 94 U. S., 315, it was held that *under the laws of New York the United States could not take by devise lands situated in that State*. Its right to take personalty bequeathed by the will which purported to make the devise appears to have been sustained by the Surrogate with no appeal from that decision. If the right of the United States to take lands by devise had been necessary to the due execution of any of its granted powers, we do not see that any statute of the State of New York could have deprived them of such right or that this Court could have denied to them such right when the question came before it.

We think, therefore, it must be assumed that in respect of the *capacity* or right of the United States to *take by bequest or gift personalty which any one* may choose to bequeath or give to them is in no respect a constitutional right nor any right essentially connected with any of its governmental powers. It is rather a question of *capacity* to take than of *powers*.

If an individual in his lifetime should choose to make a gift to the United States by putting money into the treasury as by way of gift it would, like other gifts, be effectual and irrevocable, and could not be subsequently challenged either by himself or his personal representatives after his death, and it may well be that in the absence of any effective legal provision to the contrary, such a gift made by way of bequest in a will could not be effectively challenged by the next of kin.

But in neither case would the Government take or receive the gift in virtue of any express grant to it anywhere of the power to take or receive it, but it would take or receive in analogy to the ordinary right of an individual to receive and accept, if he so chose, whatever any one else may choose to give him.

With reference to the above quoted remarks of Mr. Justice BROWN in the *Perkins case*, in so far as these remarks assume, if they do assume, that the right of disposing of personal property by will is purely statutory, and that the State may at its pleasure take it away altogether or impose such conditions upon its exercise as it, in unlimited discretion may see fit, we must in frankness admit that some of our contentions in this brief are inconsistent with such remarks in so far as respects the basis of the right of disposition by will in the State of New York (upon appeal from a judgment in which state this case comes to this Court). We think we may properly say that in New York such right of disposition is *not* a right derived from a statute of the State but

is a common law right. The reasons for so saying we have before set forth at large and need not here repeat. As to that subject in general we have discussed it elaborately on its intrinsic merits to such an extent as we deemed needful or appropriate, and what we have there said must be left to go for what, if anything, it may in the opinion of this Court, be worth. In so far as, if at all, such positions which we have taken are contrary to any *actual decision* of this Court in the *Perkins case, which this Court is disposed to hold binding and conclusive*, our contention must be in vain; but we think it may properly be said that everything said by the Court in the *Perkins case* in the portions of the opinion which we have quoted, which was not really essential in the mind of the Court to reaching the conclusion which the Court did reach, and upon which the decision was placed, namely, that the bequest was merely of the amount minus the tax, may well be laid out of view in the decision of the case at bar, which concerns the preservation from impairment or burthen of one of the specially granted and exceedingly important governmental power of the United States—if not the most important of all, certainly one of the most important—while the question in the *Perkins case* certainly did not refer to or concern any expressly granted or substantially important right or power of the government.

If either the Court or the counsel of the United States in the *Perkins case* had assumed or imagined that the decision made or to be made there upon a point of so trifling importance to the government in its practical action, as the point involved in that case was and is, could thereafter subsequently prejudice or injuriously affect or even by remote possibility control the judgment to be rendered in such a case as this, in which a judgment adverse to the immunity of the Federal Government from taxation of this character, which we claim will not only injuriously affect the pecuniary interest of

the Government to the extent of many millions in negotiating the new two per cent. loan which it now contemplates, and will render from henceforth all United States bonds, whether now existing or hereafter issued, subject to taxation of this character by the States respectively at their pleasure to an amount wholly unlimited, we think it may fairly be assumed that both counsel and Court would have bestowed upon the *Perkins case*, in view of such great ulterior effect of its decision, such a degree of careful consideration and reflection, as we think it sufficiently appears was not thought needful and was not bestowed in that case.

And, thereupon, we submit that nothing said in the opinion or decision of the *Perkins case* should be held either conclusive or of substantial importance in this case to any extent beyond what is *absolutely imperative*; and we have further to say, in reference to the alleged effect of the decision in that case, in reference to the relative rights and powers of the State and individuals in respect of bequest by will, it should not be lost sight of that in the *subsequent case* of *Magoun* vs. *The Illinois Savings Bank and Trust Company*, 170 U. S., 283, this Court, after referring to this subject, and the contention of counsel on the subject, *expressly declined to commit themselves upon the question*. We refer here to what is found on pages 288 and 289, in the opinion of the Court in that case:

> "The second principle was given prominence in the arguments at bar. The appellee claimed that the power of the State could be exerted to the extent of making the State the heir to everybody, and the appellant asserted a natural right of children to inherit. *Of the former proposition we are not required to express an opinion. Nor indeed of the latter*, for appellant conceded that testamentary disposition and inheritance was subject to *regulation*."

Notwithstanding our foregoing elaborate discussion of the *Perkins case*, we desire to say by way of *protestando* that we have done so merely by way of extreme caution; our own view being, that, if the doctrine referred to in that case carried even to the utmost extent of entitling the State to take to itself as its owner the entire property of every deceased person, in disregard of any and all rights or claim of legatees or distributees, were determined and sustained by judicial authority in the last resort, such doctrine so established would, for the reasons stated in the Second, Seventh and Eighth Points of this brief, be of no avail to our adversaries in respect of the adjudication of this case.

In *Mager* v. *Grima*, 8 How., 495, the only question involved related to the validity of the Louisiana act imposing a succession tax on *aliens*. It was with reference to *such a tax* that Chief Justice TANEY said:

> "Now the law in question is nothing more than an exercise of the power which every state and sovereignty possesses, of regulating the manner and terms upon which property real or personal within its dominion may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it."

At this point there occurs in the quotation from this opinion, found in the opinion of this Court in *U. S.* v. *Perkins*, 163 U. S., at p. 629, a most material omission. As there quoted, Chief Justice TANEY is made to declare that this right of succession *generally* is a privilege which the State may deny altogether to anybody, whereas he has, in the omitted passage, been speaking *only of the privileges so-called, accorded by the States to* ALIENS, to take property, as a favor, which would otherwise escheat, and, *as to such a privilege*, he *then* proceeds to assume, as he is quoted as doing in the *Perkins case*, that the State may deny it altogether.

"Every State or nation may unquestionably refuse to allow an *alien* to take either real or personal property, situated within its limits, either as heir or legatee, and may, if it thinks proper, direct that property so descending or bequeathed shall belong to the State. In many of the States of this Union at this day, real property devised to an *alien* is liable to *escheat*. And if a State may deny the privilege altogether, it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy. This has been done by Louisiana. The right to take is given to the alien, subject to a deduction of ten per cent. for the use of the State.

In some of the States laws have been passed at different times imposing a tax, similar to the one now in question, upon its own citizens as well as foreigners, and the constitutionality of these laws has never been questioned. And if a State may impose it upon its own citizens, it will hardly be contended that *aliens* are entitled to exemption; and that their property in our own country is not liable to the same burdens that may lawfully be imposed upon that of our own citizens."

We can see no objection to such a tax, whether imposed on citizens and aliens alike, or upon the latter exclusively."

Chief Justice TANEY thus treated such laws, *in general*, as a proper exercise of the State taxing power, and, of course, as to this there is no doubt. He *nowhere declared that in general, and as to its own citizens, the State could deny the right of succession altogether, and nowhere referred to the right as a privilege, except as it was conferred as a favor upon* ALIENS. As to them, it was and is an undoubted privilege.

Seventh Point.

This transfer tax act of New York is nothing but a taxing act, and it is not necessary to sustain it, generally, to call it a tax on a privilege. The State may impose such a tax on property in general, but not in respect to a non-taxable subject-matter, or so as to burden or conflict with, any of the powers of the United States under the Constitution. This act cannot be sustained merely by calling it a privilege tax, when it really amounts to a tax burden on the Federal borrowing power.

We confidently submit to the Court that it is entirely plain that the legislative act of the State of New York, under which this tax is claimed, is *a taxing act and nothing else. That is all it pretends or purports to be*, and it, and similar statutes, have been *repeatedly so treated and construed.*

Matter of McPherson, 104 N. Y., 306.
Matter of Vassar, 127 N. Y., 1, 12.
Succession of Sala, 50 La. Ann., 1009.
State v. *Switzler*, 143 Mo., 287.
Cope's Estate, 191 Pa. St., 1.

We have no occasion to dispute, and do not dispute, the right of the State to impose such a tax upon the devolution, in course of administration, of the estate of a decedent, whether such devolution be under will or testament, or upon intestacy, *provided always that the tax shall not be imposed upon, or in respect to a subject-matter, like these bonds here in question, which is absolutely untaxable by the State, in virtue of the provisions of the Constitution of the United States.*

It is not at all needful for the State, in order to support the right to impose a tax of this character, to resort to this extraordinary notion, that it is taxing the grant of a special franchise or privilege.

New York, like the other States of this nation, has a clear right to impose duties, imposts and excises, subject always to the limitation that, in so doing, it shall not disregard the limits specifically created by the Constitution of the United States, namely, that it shall not tax imports or exports, or tonnage, and that it shall not lay taxes which shall impede, burden or come in conflict with the powers of the United States under the Constitution, such as taxes upon the borrowing power, which is this case, taxes upon the instrumentalities of the United States, taxes upon the right of Congress to regulate commerce, &c., &c, It is not at all necessary that we should go into the complete designation of these prohibited subject matters.

The attempt of the State to impose this tax upon this subject matter, the borrowing power, prohibited by the Constitution, by calling it a tax upon a franchise or privilege, is a mere *evasion*—an attempt to "*elude*" constitutional objection by disregarding the *non-taxable* character of the subject-matter. It is, as we have said, in substance and effect, precisely like a tax upon a transfer of property *inter vivos*, a pledge of property, or various other occurrences in relation to property, which the State has a right to tax, as a duty or excise, save only that it shall not impose a tax upon a non-taxable subject matter, like the Federal borrowing power.

Eighth Point.

EVEN CONSIDERED AS A SPECIAL PRIVILEGE *or franchise tax, this particular species of tax would be void, as* A BURDEN UPON THE FEDERAL BORROWING POWER. *It is really a tax upon the bonds, or, what*

is the same thing, upon the bondholder in respect to his ownership of the bonds, as is the case always with personal taxes.

If it were determined by this Court, or conceded by us by a stipulation appearing in the record, made in such shape as that by possibility it could be absolutely conclusive upon us in respect of the judgment to be rendered in this particular case—that all dispositions of property by will or upon intestacy are made in virtue of a franchise or privilege to make them, granted by the State, and revocable at its pleasure, and that the tax which is challenged is one upon such privilege and its exercise, and not a tax upon the property disposed of under the privilege, and moreover, *that the proposition asserted by our adversaries*, that the State, upon the death of an individual, has the abstract right and power to take to itself, as its own, his entire property, is good law—still, such determination or concession would not in the least help our adversaries in their effort to establish the validity of the *tax* in question in respect of United States bonds. It would still be true, and manifest at a glance, that this is a *tax* trenching upon the powers and rights of the Federal Government, just as would a general tax imposed by the State upon the property of citizens for meeting the ordinary expenses of the government of the State or its municipalities, in so far as such general tax should embrace indebtedness of the Federal Government, or the securities evidencing and representing such indebtedness.

The rights of the State, as between it and the Federal Government, and the rights of the Federal Government, as between it and the State, are alike *in respect of these two different kinds of tax* above spoken of. The rights of the State are *no greater or more sacred in respect of the one tax than in respect of the other;* and in respect of *neither* tax is the inquiry at all material, *for what reason or upon*

what ground the State imposes the tax. As Chief Justice MARSHALL said, the States cannot "*by taxation* OR OTHERWISE" impede the constitutional powers of the Federal Government. In other words, the reason or basis of the tax, whether resting on the claim of a grant of a privilege, "or otherwise," is utterly immaterial.

Whatever may be strength or force of the grounds for supporting the State's claim of right to impose the tax, there stands against it the strength and force of the national claim of right to be exempt from any such tax.

If there be an apparent clashing between the right or alleged right of the State to impose the tax, and the right of the United States, under the Constitution, to be exempted from any such tax, the unquestionable rule is that the alleged right of the State must give way to the superior constitutional right of the Nation, under the supremacy, in this respect, which is given to it by the Constitution.

We do not see but that every ground or principle, *applicable to the annual property-tax imposed by the State or its municipalities*, so far as the indebtedness or bonds of the United States is or are embraced in such taxation, is equally applicable to this special kind of tax *in so far as we are concerned with it in this case, namely, the effect of the taxes respectively upon the borrowing power* of the United States. It *must* be conceded that if this particular tax which we challenge *does* interfere with, impede or burden the borrowing power of the United States, it must fall by the judgment of this Court, on whatsoever ground, or for whatsoever reason, the State may have chosen to impose, or seek to impose, the tax.

We think that in the preceding second point we have shown sufficiently, to put it beyond the reach of intelligent dispute, that *this tax does in its nature and effect impede and burden the borrowing power of the United States, and the acts and doings of the*

United States under and in respect of such borrowing power.

In each of the two classes of taxation above referred to, the exemption rests upon the same ground; namely, that though the tax is imposed upon the holder of United States bonds, long subsequently to the making of the contract of loan and the delivery of the evidence of the debt to the bondholder, *the burden of such tax will and must fall upon the Government of the United States, because of its being contemplated and provided for in the bargaining for and making* of the contract of loan, by an allowance to thebondholder for the tax burden which will subsequently fall upon him. In order to set aside the tax of either of these two classes upon the ground of its interference with, and burdening of, the borrowing power of the United States, it needs not that the status shall be, that *in each and every possible case* of bargaining between the lender and the Government in respect of a loan, and for adjusting its terms, the future burden of this tax will *inevitably* be allowed for. It is sufficient, that such tax naturally tends, in the ordinary, practical working of affairs, to impose a pecuniary burden of its amount upon the Government in the manner above referred to. It is too clear for dispute that its *actual practical effect will be* to impose such burden, really and truly, *upon the United States Government, at the time of making the loan, in all ordinary cases.* It will be so in all cases in which the lender is *a person of ordinary intelligence* and *has in view that which is before him* and his successors in interest as a question of property and net income, in respect of the loan which he makes, and the rights and interests involved in it, up to the time of its being ultimately paid off, assuming him to be governed by the ordinary motives of human action. If there be any case in which this practical effect upon the Government does not follow—of its being actually compelled by the necessity of the case, when seeking to borrow money, not neces-

sarily from any particular person or persons, but from the general mass of persons who have funds in hand, which they desire to invest, and who are absolutely free to decide whether they will invest in this particular monied security in preference to some other monied security in which they might invest, if they chose, to make allowance for the future burden of the tax in its bargain with the lender it could only be the case of an intending lender, *so careless or so hoodwinked as not to perceive the inevitable burden of the subsequent taxation* upon himself and his successors in interest; and certainly in the determination of such a question as this *the exceptional case of such a person* is not worthy of being considered.

The principle which we have above stated in this point does not depend merely upon reasoning, and is by no means new in this Court. It has been repeatedly decided that a State *cannot impose a tax upon a privilege granted by itself, e. g.*, a privilege granted to an auctioneer, or person whom the State imposing the tax chose to call a peddler, though, in fact, he was a person pursuing the vocation of a traveling salesman, of whom there are so many thousands, *where such tax is an interference with a constitutional right or power of the Federal Government*, and so in other cases, where there is such an interference.

It makes no difference, in respect of the applicability of this principle, *what particular power of the Federal Government would be interfered with* by the imposition of such *privilege tax* by the State.

As this Court has recently said, in referring to this power of the States as *restricted by the provisions of the Fourteenth Amendment* —

> "Our inquiry must be, not what will satisfy the provision of the State Constitution, but *what will satisfy the rule of the Federal Constitution. The power of the States over successions may be as plenary in the abstract as appellee contends for, nevertheless it must be exerted within the limitations of that Consti-*

> *tution.* If the power to take by devise or inheritance be a privilege, it must be conferred or regulated by equal laws."
>
> *Magoun* v. *Ill. Trust & Savings Bank*, 170 U. S., 283, at p. 292.

In other words, like all other powers which have been reserved to the States, and may be exercised by them at will, this power to regulate testamentary disposition and intestate succession, assuming it to be a privilege, is subject to the paramount powers of the Federal Government and the limitations imposed by the Federal Constitution.

In *Brown* v. *Maryland*, 12 Wheat., 419, at p. 444, Chief Justice MARSHALL, in considering the general power of the States to tax an occupation or privilege, said:

> "*It is true the State may tax occupations generally*, but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician or the mechanic must either charge more on the article in which he deals, or *the thing itself is taxed through his person.* This the State has a right to do, *because no constitutional prohibition* extends to it. *So a tax on the occupation of an importer is, in like manner, a tax on importation.* It must add to the price of the article, and be paid by the consumer, or by the importer himself, *in like manner, as a direct duty on the article itself would be paid. This the State has not a right to do, because it is prohibited by the Constitution*"

As to the further claim that, although the tax there in question plainly interfered with the power to regulate commerce, it was imposed in the exercise of the State's absolute right to tax all persons and property within its jurisdiction, he said (p. 448):

> "*We admit this power to be sacred; but cannot admit that it may be used so as to ob-*

struct the free course of a power given to Congress. We cannot admit that it may be used so as to obstruct or defeat the power to regulate commerce. It has been observed that the powers remaining with the States may be so exercised as to come in conflict with those vested in Congress. When this happens, *that which is not supreme must yield to that which is supreme. This great and universal truth is inseparable from the nature of things, and the Constitution has applied it to the often interfering powers of the general and State governments, as a vital principle of perpetual operation. It results necessarily from this principle, that the taxing power of the States must have some limits. It cannot reach and restrain the action of the national government within its proper sphere.* It cannot reach the administration of justice in the courts of the Union, or the collection of the taxes of the United States, *or restrain the operation of any law which Congress may constitutionally pass.*"

We refer below to some of the authorities which relate mainly to interferences with the powers of the Government in respect of interstate commerce and foreign commerce; but, of course, it makes no difference that the interference be, as in this case, with the borrowing power of the Government, *except that* in the latter case, the interference is with the pecuniary rights of the Government to an immense extent, so as to be really more important practically than interference with the other powers.

In *Pollock* v. *Farmers' Loan and Trust Co.*, 157 U. S., 429, at 581, Mr. Chief Justice FULLER said:

> "If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution, or of the rule of taxation and representation, so carefully recognised and guarded in favor of the citizens of each State. But constitutional provisions

cannot be thus evaded. It is the substance and not the form which controls, as has indeed been established by repeated decisions of this Court. Thus in *Brown* v. *Maryland*, 12 Wheat., 419, 444, it was held that the tax on the occupation of an importer was the same as a tax on imports, and therefore void. And Chief Justice Marshall said: 'It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself.

In *Weston* v. *Charleston*, 2 Pet., 449, it was held that a tax on the income of United States securities was a tax on the securities themselves, and equally inadmissible. The ordinance of the City of Charleston involved in that case was exceedingly obscure; but the opinions of Mr. Justice Thompson and Mr. Justice Johnson, who dissented, make it clear that the levy was upon the interest of the bonds and not upon the bonds, and they held that it was an income tax, and as such sustainable; but the majority of the Court, Chief Justice Marshall delivering the opinion, overruled that contention.

So in *Dobbins* v. *Commissioners*, 16 Pet., 435, it was decided that the income from an official position could not be taxed if the office itself was exempt.

In *Almy* v. *California*, 24 How., 169, it was held that a duty on a bill of lading was the same thing as a duty on the article which it represented; in *Railroad Co.* v. *Jackson*, 7 Wall., 262, that a tax upon the interest payable on bonds was a tax not upon the debtor, but upon the security; and in *Cook* v. *Pennsylvania*, 97 U. S., 556, that a tax upon the amount of sales of goods made by an auctioneer was a tax upon the goods sold.

In *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S., 326, and *Leloup* v. *Mobile*, 127 U. S., 640, it was held that a tax on income received from interstate commerce was a tax upon the commerce itself, and therefore

unauthorized. And so, although it is thoroughly settled that where, by way of duties laid on the transportation of the subjects of interstate commerce, and on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a State on interstate commerce, such taxation amounts to a regulation of such commerce, and cannot be sustained, yet the property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or domestic commerce, may be taxed, and when the tax is substantially a mere tax on property and not one imposed on the privilege of doing interstate commerce, the exaction may be sustained. The substance, and not the shadow, determines the validity of the exercise of the power" (*Postal Telegraph Co.* v. *Adams*, 155 U. S., 688, 698)."

In *Pollock* v. *Farmers' Loan and Trust Co.* (Rehearing), 158 U. S., 601, at page 691, Mr. Justice BROWN said:

"I regard the doctrine as entirely well settled in this Court, that a tax upon an incident to a prohibited thing is a tax upon the thing itself, and, if there be a total want of power to tax the thing, there is an equal want of power to tax the incident. A summary of the cases upon this point may not be inappropriate in this connection. Thus, in *Brown* v. *Maryland*, 12 Wheat., 419, a license tax upon an importer was held to be invalid as a tax upon imports; in *Weston* v. *Charleston*, 2 Pet., 449, a tax upon stock for loans to the United States was held invalid, as a tax upon the functions of the government; in *Dobbins* v. *Commissioners*, 16 Pet., 435, a State tax on the salary of an office invalid, as a tax upon the office itself; in the *Passenger Cases*, 7 How., 283, a tax upon alien passengers arriving in ports of the State was held void, as a tax upon commerce; in *Almy* v. *California*, 24 How., 169, a stamp tax upon bills of lading was held to be a tax upon exports; in *Crandall* v. *Nevada*, 6 Wall., 35, a tax upon railroads and stage companies for every passenger carried out of the State, was held

to be a tax on the passenger for the privilege of passing through the State; in *Pickard* v. *Pullman Southern Car Co.*, 117 U. S., 34, a tax upon Pullman cars running between different States was held to be bad as a tax upon interstate commerce; and in *Leloup* v. *Mobile*, 127 U. S., 640, a similar ruling was made with regard to a license tax for telegraph companies; and finally in *Cook* v. *Pennsylvania*, 97 U. S., 566, a tax upon the sale of goods was held to be a tax upon the goods themselves. Indeed, cases to the same effect are almost innumerable. In the light of these cases, I find it impossible to escape the conclusion that a tax upon the rents or income of real estate is a tax upon the land itself."

And at page 693:

"The tax upon the income of municipal bonds falls obviously within the other category of an indirect tax upon something which Congress has no right to tax at all, and hence is invalid. Here is a question, not of the method of taxation, but of the power to subject the property to taxation in any form. It seems to me that the cases of *Collector* v. *Day*, 11 Wall., 113, holding that it is not competent for Congress to impose a tax upon the salary of a judicial officer of a State; *McCulloch* v. *Maryland*, 4 Wheat., 316, holding that a State could not impose a tax upon the operation of the Bank of the United States; and *United States* v. *Railroad Co.*, 17 Wall., 322, holding that a municipal corporation is a portion of the sovereign power of the State, and is not subject to taxation by Congress upon its municipal revenues; *Wisconsin Central Railroad* v. *Price*, 133 U. S., 496, holding that no State has the power to tax the property of the United States within its limits; and *Van Brocklin* v. *Tennessee*, 117 U. S., 151, to the same effect, apply *mutatis mutandis* to the bonds in question, and the tax upon them must, therefore, be invalid."

In *Welton* v. *State of Missouri*, 91 U. S., 275, a statute of Missouri provided as follows:

> "Whoever shall deal in the selling of patent or other medicines, goods, wares or merchandise, except books, * * * which are not the growth, produce or manufacture of this State, by going from place to place to sell the same, is declared to be a peddler."

The act then prescribed a license for a peddler, and a penalty for selling without one. It further declared that no license was necessary for selling the products of Missouri. It was held by the State Court that the tax was only upon a *calling* or *profession*, and neither directly nor indirectly upon property.

Mr. Justice FIELD said (p. 278):

> "The license charge exacted is sought to be maintained as a tax upon a calling. It was held to be such a tax by the Supreme Court of the State; a calling, says the Court, which is limited to the sale of merchandise not the growth or product of the State.
>
> The general power of the State to impose taxes in the way of licenses upon all pursuits and occupations within its limits is admitted, but, like all other powers, must be exercised in subordination to the requirements of the Federal Constitution. Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is in effect a tax upon the goods themselves. If such a tax be within the power of the State to levy, it matters not whether it be raised directly from the goods, or indirectly from them through the license to the dealer; but, if such tax conflict with any power vested in Congress by the Constitution of the United States, it will not be any the less invalid because enforced through the form of a personal license."

In *Cook* v. *Pennsylvania*, 97 U. S., 566, Pennsylvania taxed auctioneers a license fee on all sales of foreign goods at one rate, and on sales of domestic

goods at a different rate. The tax in this case was on certain imports which were property of the importer at the time of sale. Held that the tax was unconstitutional.

Mr. Justice MILLER said:

> "But it is argued that the authority of the auctioneer to make any sales is derived from the State, and that the State can, therefore, impose upon him a tax for the privilege conferred, and that the mode adopted by the statute of measuring that tax is within the power of the State. That being a tax on him for the right or privilege to sell at auction, it is not a tax on the article sold, but the amount of the sales made by him is made the measure of the tax on that privilege. In support of this view, it is said that the importer could himself have made sale of his goods without subjecting the sale to the tax. The argument is fallacious, because without an auctioneer's license he could not have sold at auction even his own goods. If he had procured, or could have procured, a license, he would then have been subject by the statute to the tax, for it makes no exception. By the express language of the statute, the auctioneer is to collect this tax and pay it into the treasury. From whom is he to collect it if not from the owner of the goods? If the tax was intended to be levied on the auctioneer, he would not have been required first to collect it and then pay it over. It was, then, a tax on the privilege of selling foreign goods at auction, for such goods could only be sold at auction by paying the tax on the amount of the sales. * * *
>
> The tax on sales made by an auctioneer is a tax on the goods sold, within the terms of this last decision [*Welton* v. *Missouri*, 91 U. S., 275], and, indeed, within all the cases cited; and when applied to foreign goods sold in the original package of the importer, before they have become incorporated into the general property of the country, the law imposing such tax is void as laying a duty on imports."

In *Guy* v. *Baltimore*, 100 U. S., 434, an ordinance of Baltimore requiring certain wharfage charges for vessels landing at the public wharves, produce of States other than Maryland, was held invalid as a tax upon interstate commerce.

In *Webber* v. *Virginia*, 103 U. S., 344, a license was required of agents for the sale of sewing machines made out of the State.

Mr. Justice FIELD said:

> "The agent for the sale of articles manufactured in other States must first obtain a license to sell, for which he is required to pay a specific tax for each county in which he sells or offers to sell them; while the agent for the sale of articles manufactured in the State, if acting for the manufacturer, is not required to obtain a license or pay any license tax. Here there is a clear discrimination in favor of home manufacturers and against the manufacturers of other States. Sales by manufacturers are chiefly effected through agents. A tax upon their agents when thus engaged is, therefore, a tax upon them, and if this is made to depend upon the foreign character of the articles, that is, upon their having been manufactured without the State, it is to that extent a regulation of commerce in the articles between the States. It matters not whether the tax be laid directly upon the article sold or in the form of licenses for their sale. If by reason of their foreign character the State can impose a tax upon them or upon the person through whom the sales are effected, the amount of the tax will be a matter resting in her discretion. She may place the tax at so high a figure as to exclude the introduction of the foreign article and prevent competition with the home product. It was against legislation of this discriminating kind that the framers of the Constitution intended to guard when they vested in Congress the power to regulate commerce among the several States."

In *Almy* v. *California*, 24 How., 169, a case which involved the validity of a stamp tax upon bills of

lading of gold and silver shipped out of the State, Mr. Chief Justice TANEY, after referring to *Brown* v. *Maryland*, 12 Wheat., 419, said:

> "So in the case before us. If the tax was laid upon the gold or silver exported, every one would see that it was repugnant to the Constitution of the United States, which in express terms declares that 'no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.'
>
> But a tax or duty on a bill of lading, although differing in form from a duty on the article shipped, is in substance the same thing; for a bill of lading, or some written instrument of the same import, is necessarily always associated with every shipment of articles of commerce from the ports of one country to those of another."

In *Phila. Steamship Co.* v. *Pennsylvania*, 122 U. S., 326, at 335, Mr. Justice BRADLEY said:

> "The question which underlies the immediate question in the case is, whether the imposition of the tax upon the steamship company's receipts amounted to a regulation of, or an interference with, interstate and foreign commerce, and was thus in conflict with the power granted by the Constitution to Congress? The tax was levied directly upon the receipts derived by the company from its fares and freights for the transportation of persons and goods between different States, and between the States and foreign countries, and from the charter of its vessels which was for the same purpose. This transportation was an act of interstate and foreign commerce. It was the carrying on of such commerce. It was that and nothing else. * * * Taxing the transportation, either by its tonnage, or its distance, or by the number of trips performed, or in any other way, would certainly be a regulation of the commerce, a restriction upon it, a burden upon it. Clearly

> this could not be done by the State without interfering with the power of Congress. * * *
>
> If, then, the commerce carried on by the plaintiff in error in this case could not be constitutionally taxed by the State, could the fares and freight received for transportion in carrying on that commerce be constitutionally taxed. If the State cannot tax the transportation, may it, nevertheless, tax the fares and freights received therefor? Where is the difference? Looking at the substance of things, and not at mere forms, it is very difficult to see any difference. The one thing seems to be tantamount to the other. It would seem to be rather metaphysics than plain logic for the State officials to say to the company: 'We will not tax you for the transportation you perform, but we will tax you for what you get for performing it.' Such a position can hardly be said to be based on a sound method of reasoning. * * * A tax upon fares and freights received for transportation is virtually a tax upon the transportation itself."

In *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S., 196, the State of Pennsylvania had imposed a tax upon plaintiff in error, under a statute which taxed all companies doing business in State. Plaintiff in error had no property in Pennsylvania, except a lease of a ship, and its only business was to carry passengers from New Jersey to Philadelphia.

Mr. Justice FIELD said:

> "The business of landing and receiving passengers and freight at the wharf in Philadelphia is a necessary incident to, indeed, is a part of, their transportation across the Delaware River from New Jersey. Without it that transportation would be impossible. Transportation implies the taking up of persons or property at some point and putting them down at another. A tax, therefore, upon such receiving and landing of passengers and freight is a tax upon their transportation; that is, upon the commerce between the two States involved in such transportation." * * * (at p. 205).

> "As to the second reason given for the decision below, that the company could not lease its wharf in Philadelphia, except by the implied consent of the Legislature of the Commonwealth, and thus is dependent upon the Commonwealth to do its business, and therefore can be taxed there, it may be answered that no foreign or interstate commerce can be carried on with the citizens of a State without the use of a wharf, or other place within its limits on which passengers or freight can be landed and received, and the existence of power in a State to impose a tax upon the capital of all corporations engaged in foreign or interstate commerce for the use of such places would be inconsistent with and entirely subversive of the power vested in Congress over such commerce."

Brennan v. *Titusville*, 153 U. S., 289. An ordinance of Titusville, Penna., required all persons soliciting orders for books, &c., or delivering the same on orders, to take out a license, and imposes a penalty for failure to comply with it. Brennan was the agent of a Chicago, Illinois, firm, to which he forwarded the orders, and the things ordered were sent from there to the purchaser by express.

Mr. Justice BREWER said:

> "It is true, in the present case, the tax is imposed only for selling to persons other than manufacturers and licensed merchants; but if the State can tax for the privilege of selling to one class, it can for selling to another, or to all. In either case it is a restriction on the right to sell, and a burden on lawful commerce between the citizens of two States * * * That this license tax is a direct burden on interstate commerce is not open to question" (citing Brown *v.* Maryland, 12 Wheaton, 419, and Welton *v.* Missouri, 91 U. S., 275).

In *McCall* v. *California*, 136 U. S., 104, plaintiff in error had an office in San Francisco as the representative of a railroad from Chicago to New York,

to induce persons going from San Francisco to New York to take that line at Chicago. He sold no tickets and took in no receipts. Held that a license tax upon privilege of doing business in San Francisco was a tax on interstate commerce, and void.

LAMAR, *J.* (p. 109), said:

> "The tax upon it, therefore, was, according to the principles established by the decisions of this Court, a tax upon a means or an occupation of carrying on interstate commerce, pure and simple."

It can hardly be necessary to refer to the well settled principle that the pecuniary amount of the State tax which is to be set aside as unconstitutional is not of any legal consequence, yet we do so very briefly.

In the case of *Brown* v. *Maryland*, 12 Wheat., 419, which has come to be one of the great landmarks of the law, and which is probably more often cited in this Court than any other single case, the question involved was as to the validity of the requirement by the State of a license tax to sell, for which was made by the State the charge of fifty dollars. The application of this general principle to the borrowing power of the United States was first made in *Weston* v. *Charleston*, 2 Pet., 449, in which case Chief Justice MARSHALL—plainly perceiving that if the States were permitted to tax at all the borrowing power of the General Government, there being no limitation upon the amount of the tax, if they were allowed to impose it, other than their own will, it would be impossible to foresee to what extent such taxation could be carried—laid down in express terms the rule that such State taxation, to *any amount, however inconsiderable*, was an interference with the constitutional rights of the United States, and must therefore be annulled by the judgment of this Court.

We have considered under the second point what

would be the burden of State taxation of this character at the rate prescribed by the existing statute of the State relating to what is called the "Transfer Tax," but we are entitled to have this case considered as if this were a tax imposition by the State at the rate of fifty per cent. upon the capital of the bonds, in which case we think none of our adversaries would have the hardihood to contend that the tax and its necessary future effect would be overlooked by any one in adjusting the terms of a loan by an individual to the Government.

EFFECT OR NON-EFFECT OF TAX BEING OR NOT BEING IN FORM "UPON THE BONDS." THE MEANING OF THE WORDS "THAT THE BONDS SHALL BE EXEMPT," IS THAT THE BONDHOLDER SHALL BE EXEMPT.

The two ideas or propositions, one that the contract exemption of the bonds from taxation, whether State or Federal, which is provided for by the Funding Act of July 14, 1870, and by the exemption clause written on the face of the bonds is a contract running to and available by *the bonds* and *not the bondholders;* and the other, which, in respect of the ascertainment of and adjudication concerning substantial legal rights in respect of a particular tax imposed or undertaken to be imposed, attributes great importance to the circumstance that the tax is, or is not, in form laid upon the bonds, are very nearly akin to each other, so that they might be called twin brothers, and they are alike, mere fallacies, built up upon the supposed grammatical effect of *mere words,* which are *used merely as figures of speech,*—in entire disregard of real substance and the evident intent and meaning with which the language is used.

The first of these two proposition, viz., that relating to the effect of the words that *the bonds* shall be exempt from taxation, may be disposed of

with brevity. Unquestionably this is intended to be an actual and effective contract. A bond is an inanimate thing, a piece of paper; the thing intended to be exempted is the debt owing by the Government which is evidenced and represented by the bond; but to give effect to an exemption of this character in respect of Government indebtedness, it needs not that there should be any bonds. If the bond given under this act should be accidentally destroyed by fire or otherwise, without willful fault of the bondholder, the right to the debt and to the contract exemption in respect of it would thereafter exist in favor of the creditor as completely as it did while the bonds remained in existence. But, as we have said, it needs not that there ever should have been any bonds. This Government might at any time hereafter adopt in this respect the same practice as has long, and we believe always, been pursued by the British Government in respect of much the greater part of its debt existing in the form commonly known as Consols or inscribed Consols, as to which, the right, or evidence of the right, of the creditor rests upon his name being inscribed on the books of the Government, kept by its agent, the Bank of England, as the creditor of the Government in respect of a specified amount of this kind of indebtedness, the creditor holding no bond, certificate or other document whatever emanating from the Government or the bank evidencing his right to the debt, and the transfer when made, being accomplished merely by a transfer on the books kept at the bank, in pursuance of written authority from the creditor or his attorney in fact or legal representative delivered to and left with the bank.

The exemption declared by the Refunding Act and on the bonds is an exemption from *payment* of the tax. Certainly this exemption is for the benefit of and runs to, *the person* who, if there were no exemption, would be *obliged to make the payment*. Clearly,

that is the bondholder. The *bond* does not pay and cannot pay. It is impersonal. It has no bank account, or check book, or money bag, or other means whatsoever of payment. In short, the language here used to the effect that the bond shall be exempt is *figurative*, and the *meaning and legal effect of* it, *that the bondholder* shall be exempt, is too clear to need any further remarks in relation to it.

Then, in relation to the second proposition, as to the assumed greater importance and decisiveness of the question, whether the tax in respect of which the dispute arises, is or is not *laid upon the bonds*. In this connection, the *specific* "LIEN" imposed by this New York act *upon the bonds* (Tax Law, § 222), and the *power of sale* vested in the executors (§ 224), as showing the real *burden* of the tax, are important considerations. They may not make the tax technically "direct," under the Federal constitution (*Scholey* v. *Rew*, 23 Wall., 391), but they do point directly to that which must bear the tax burden. In so far as the supposed importance of this question refers to substance and not to mere form the question whether or not the tax is imposed "upon the bonds," or the distinction in that respect in most instances (we are not prepared to say in all instances), can be of substantial importance, only with reference to determining whether the tax is a *direct or indirect* tax, but that question is entirely eliminated from this case by the unanimous decision of this Court in the income tax case of *Pollock* vs. *Farmers' Loan and Trust Company*, 157 U. S., 429; 158 U. S., 601, to which we have before referred at length, as well as by the preceding cases of *Brown* vs. *Maryland* and others following in the same line which are elsewhere referred to in the brief. This Court has conceded the full application of these latter cases to instances of an *indirect burden upon a non-taxable subject-matter*.

Pollock v. *Farmers' Loan & Trust Company*, 158 U. S., at pp. 629–630.

Mr. Justice BROWN, 158 U. S., at p. 698.
Mr. Justice WHITE, 157 U. S., at p. 646–7.

But even as to matter of form merely it certainly is in *some cases* not important that the tax, say such as the ordinary State, city and County taxes, (which, under the taxation system of the State of New York are annually collected from its citizens to an aggregate amount far exceeding one hundred millions, and which are unquestionably direct taxes), should be laid upon the bond or other particular property, *in form* or *eo nomine*. Under the New York system of taxation a *personal property tax is* imposed upon the property-holder personally as a tax upon a stated amount of personal property, possessed or supposed to be possessed by him, without reference to the particular items making up such amount, of which items the authorities assessing the tax are *usually* entirely ignorant at the time of making the assessment and remain so ignorant thereafter save in the case of the taxpayer raising an objection to the amount for which he is assessed, which objection *may* make it necessary to have an ascertainment of the particular items of the property, *with reference to a claimed exemption* or with reference to some other point which may turn out to be involved, but however that may be, the question of what the taxpayer's personal property consists is *ordinarily* confined to his own breast. We have in New York no "listing" system as it is commonly called, and though attempts have been at divers times made to establish such a system, the attempts have always proved ineffectual; and even in the case of there coming to be a development of the particular items composing the personal estate of the taxpayer, there never is any specific *assessment upon* such estate or any part of it. The assessment is upon the owner personally and does not create

a lien upon, or bind in any way the property, whether known or unknown to the public authorities, in respect of the ownership of which the assessment is made. After the imposition of the tax and before its payment, the taxpayer has the absolute and complete right between the time of the imposition of the tax and the time of its collection to dispose of his personal property in respect of which the tax is imposed, free from any lien or claim whatsoever for or in respect of the tax, and this, although intermediate the time of the assessment and the time when it is or ought to be paid, he may have become insolvent.

Taxes are imposed upon property owners "*for or in respect of* their property" and "*many because of ownership*" (*Pollock* v. *Farmers' Loan and Trust Co.* (*Rehearing*), 158 U. S., at pp. 627, 629-630), but as this Court there said, if the nature and source of the property itself are "not open to inquiry, constitutional safeguards might be easily *eluded*." Here the property consists of United States Bonds, and, being a *non-taxable subject matter*, all of its *incidents*, including this right to transfer it by will, are *likewise non-taxable*.

And for showing *how the State has itself regarded* at least at one time taxes of this character in a certain aspect we refer to certain cases, one of which is the case *In the Matter of Whiting*, 150 N. Y., 27. That case was this:

One Augustus Whiting, a resident of Newport, Rhode Island, died there on the 23d day of July, 1894, leaving a will by which he gave his entire estate in trust for his infant daughter. He had at the time of his death on deposit in a safe deposit company in New York certain bonds of domestic and foreign corporations and certain United States bonds. It was held by the Surrogate of New York upon the appraisal of the property of the decedent under the Transfer Tax Act of 1892 that *all these bonds*, including the United States bonds, were taxable at

the rate prescribed in the statute, and, that ruling of the Surrogate having been affirmed by the Supreme Court the case came before the Court of Appeals, upon appeal from that decision, and this case, in 150 N. Y., page 27, is the report of the case in the Court of Appeals, that Court holding, by a divided vote, that the corporate bonds belonging to Whiting, which were in the safe deposit vault in New York at the time of his death, (*though not the United States bonds*) were subject to the Legacy Tax at the rate prescribed by the Act of 1892, notwithstanding the fact that *Whiting, the owner, was a resident of Rhode Island, where his will was made and proved, and the right to his property passed to the executors*, and this notwithstanding it was pointed out in the opinion of one of the dissenting Judges, that—

> "The State has no jurisdiction over a right of succession which accrues under the laws of the foreign State. That is something in which this State has no interest and with which it is not concerned. The legal title to these bonds vested in the personal representatives of the decedent by force of foreign laws, and we have held that an executor's title will be recognized by the laws of this State without any grant of letters by its courts."

But notwithstanding this, *the taxation was sustained* by a majority of the Court *upon the ground that the bonds*, being in New York, *constituted property in New York and, therefore, they were subject to this New York taxation.*

We do not cite this case for the purpose of arraigning the soundness or justice of the judgment of the Court of Appeals in it, but, *first*, to show that such is the law in New York as expounded by its highest court, and thus that if the claim of our adversaries in this case be sustained, a person proposing to make a loan to the United States who receives its bonds for the

amount loaned and having it before his eyes in determining whether he would make the investment or not, if he were situated as Mr. Whiting was, *i. e.*, a resident in one State and keeping his securities for the sake of safety against burglars, &c., in a place of safety deposit, provided in New York City for the purpose, he would be subject to the legacy taxes of this character to be imposed in unlimited discretion, by *two* States, namely, the State of his domicil and the other State where his bonds were, as we suppose there can be no doubt that Mr. Whiting's estate was liable to any taxes either of this character or any other character that might be legally imposed upon it by the State of Rhode Island, where he resided; and *second*, for the purpose of showing that, according to the Law of the State of New York, as expounded by its highest court in this *Whiting case*, a legacy tax of this character seemed to be *a tax upon property*.

The only possible ground for supporting the taxation of those bonds was that they were *property within the State of New York*. The State of New York could touch the subject matter, in that one way and by reason of that single circumstance and by *none other*. If the right to dispose of the property by will was a privilege or franchise; that privilege or franchise was derived *solely* from the State of Rhode Island where Whiting lived. The State of New York had nothing to do with it and could not tax it.

We confess our inability to perceive how, a decision which our adverseries assume to have been made in the Court below, and which they seek to have affirmed in this Court, that a tax under the Statute of 1892 in respect of funds held by a testator is merely a tax upon a privilege or franchise, and not at all a tax upon property, when the question is in respect of taxing under the statute of 1892 United States bonds held by a testator at his death, can be reconciled with the decision made not long ago by the same Court under the same statute, maintaining the taxation of Whiting's United States

bonds, *because of their being in New York at Whiting's death, and therefore property in New York*, that being the only thing that was in New York. If this was a property tax for the purpose of taxing Whiting's bonds of corporations, it seems to us it is a property tax for the purpose of sustaining our claim of exemption from taxation of every kind upon or in respect of United States bonds.

There is another circumstance in relation to this Whiting case in 150th New York; the Court of Appeals held, reversing in that respect the judgment below, that under the act Mr. Whiting's United States bonds were *not* subject to a tax by the Transfer Tax Act of 1892, *because* the Twenty-second Section of that act in its definition of the word "property" provided that it should embrace property situated within or without this State; *over which this State has any jurisdiction for the purpose of taxation;* whereupon the Legislature of New York passed *another* statute leaving out these words, "over which this State has any jurisdiction for the purpose of taxation."

Another case was presented upon a claim to tax United States bonds through this so-called Transfer Tax under the Law of 1892, and that is the case of *In the Matter of Sherman*, 153 N. Y. Rep., 1, and in that case the Court of Appeals held that, if, the words "property over which this State has any jurisdiction for the purpose of taxation" had been eliminated from the statute, the tax would have been properly imposed, the decision being put upon the ground that this was not at all a tax upon the property; and it is upon the authority of this case that,, the Court below made its decision in the case which is now here on argument.

We make the following quotations from the opinion of ANDREWS, Chief Judge, in this case, in 153 N. Y., page 1:

> "The power of a State to tax the right of transfer of property by will or the right of succession under the intestate laws of the State

is not an open question. It results from the acknowledged principle that the right to dispose of property by will, and of succession thereto in cases of intestacy is derived from and under the municipal law. The State which confers the right and prescribes the rule of descent or distribution may therefore annex to the privilege which it confers such *reasonable conditions* to its enjoyment as it may deem expedient. *There is no doubt that the laws for the taxing of inheritances or of the right of transfer by will are within the general scope of legislative power.* The special question here is *whether the Act of 1892* exempts from valuation for the purpose of fixing the tax imposed by the act that part of the estate of the testator represented by United States bonds. The form of the question above stated *assumes that the bonds would be the proper subject of valuation unless excluded by the true construction of ths act.* If the tax imposed by the Law of 1892 is a property tax *in the ordinary sense*, levied upon the property of a testator or an intestate, it could not be sustained as a lawful exercise by the State of the power of taxation so far as it affected securities of the Federal Government. The principle that a State cannot in the exercise of the power of taxation tax obligations of the United States was established at an early day. *But the tendency both of the Federal and State courts has been in the direction of limiting the operation of this immunity*, and to uphold State statutes imposing taxation, which, although operating *indirectly upon property in Government securities*, were enacted for another purpose and *where the indirect taxation* was merely an incident to the exercise by the State of an acknowledged power of government. Laws taxing franchises of corporations and providing for taxation, measured by the value of the corporate property, including Federal securities, or by income derived in part from investments therein, have been sustained, and *illustrate the tendency* to which we have referred."

As the authority for this proposition, the Judge cites the two cases in Sixth Wallace and the case of *Home Insurance Company* v. *New York State*, 134 U. S., 594, which we have before elaborately discuss and which we think we have shown *do not really touch this question, they being merely taxes upon special privileges granted by the State upon artificial beings created by itself.*

We also note that, notwithstanding he calls this a privilege granted by municipal law, Judge ANDREWS only insists up the right of that law to *regulate* and impose "*reasonable conditions.* With that no one will disagree.

Having thus disposed of the real question he refers to authorities which seem to us quite inapplicable, and *without adverting to what we regard as the real point*, that the effect of permitting such a tax to be imposed by a State is in substantial effect to impose the burden of the tax upon the Government of the United States, because of its being inevitably borne by them in the adjustment between them and the original lender of the terms and conditions of the loan, Judge Andrews proceeds to discuss the question at issue in reference to the particular provisions of the statutes of New York. With that part of the opinion we have no such concern as to make it worth while for us to enter here into elaborate discussion.

We notice here the apparent assumption by Judge ANDREWS in his opinion that "indirect taxation" may be imposed upon or in respect of United States bonds where it is merely an incident to the exercise by the State of an acknowledged power of government. We think it is sufficiently shown in other parts of this brief that the Constitution of the United States does in effect contain as complete a prohibition of *indirect taxation* as of direct taxation upon or in respect of the bonds of or loans to the Government of the United States or the ordinary or natural incidents of such bonds or loans.

We have here to refer to a discussion of certain propositions asserted by our adversaries in their

brief in the Court below, and which we suppose may be repeated here, to the substantial effect that the principle that we maintain involves an impairment of or interference with the power of the state to regulate the disposition of property by will, the power to do which it is said, has not been granted to the United States.

We will not take time to refer in detail to the various statements in the brief of our adversaries which rest substantially upon this assertion.

This assertion of the learned counsel on the other side proceeds upon an entire misconception. *We do not* in the least question or claim to interfere with the *general right* of the State to prescribe by its laws the method of disposing of property by will or the distribution of it in case of intestacy. *Our position simply* is that when it comes to impose a tax upon such a disposition of property by will or in case of intestacy, it cannot impose such a tax upon property which, under the Constitution of the United States is, in the interest and for the benefit of the Federal Government and for the protection of its power to borrow money for national uses exempt from any taxation by State authority. They have no more right to impose this tax than to impose any other tax, whether direct or indirect, which interferes with the rights of the Federal Government, and if allowed to be imposed will practically be worked out of and paid by the United States.

Under the Constitution of the United States, this indebtedness of the United States for money borrowed, and the evidences of the debt held by the creditor constitute a subject matter absolutely untaxable by any State, and when a citizen of New York, who is likewise a citizen of the United States, has thus become a creditor of the United States, he is no more subject to taxation upon or in respect of that *indebtedness, or of any lawful doings in respect of it*, by the State of New York, than he is to any such taxation by the Dominion of Canada.

Finally.

The judgment and decree below should be reversed, and the case remanded with the usual directions to the Court below.

EVARTS, CHOATE & BEAMAN,
Attorneys for Plaintiff in Error.

WILLIAM V. ROWE,
TREADWELL CLEVELAND,
Of Counsel.

No. 489.

FILED
FEB 24 1900
JAMES H. McKENNEY,
Clerk.

App't to Br. of Rowe v. Cleveland & P. E.

STATE INHERITANCE TAX ON UNITED STATES BONDS.

Filed Feb. 24, 1900.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 489.

HARRY PLUMMER, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF JOSEPH PLUMMER, DECEASED,

Plaintiff in Error,

vs.

BIRD S. COLER, COMPTROLLER OF THE CITY OF NEW YORK,

Defendant in Error.

In Error to the Surrogate's Court of the County of New York, in the State of New York.

APPENDIX TO BRIEF FOR PLAINTIFF IN ERROR, CONTAINING STATE STATUTES, TREASURY STATISTICS, &c.

EVARTS, CHOATE & BEAMAN,
Attorneys for Plaintiff in Error.

WILLIAM V. ROWE,
TREADWELL CLEVELAND,
Of Counsel.

APPENDIX.

THE NEW YORK LAW OF
TAXABLE TRANSFERS.

THE TAX LAW.

Ch. 908, Laws 1896, as amended by Ch. 284, Laws 1897.

ARTICLE X.

TAXABLE TRANSFERS.

Section 220. Taxable transfers.
221. Exceptions and limitations.
222. Lien of tax and payment thereof.
223. Discount, interest and penalty.
224. Collection of tax by executors, administrators and trustees.
225. Refund of tax erroneously paid.
226. Deferred payments.
227. Taxes upon devises and bequests in lieu of commissions.
228. Liability of certain corporations to tax.
229. Jurisdiction of the surrogate.
230. Appointment of appraisers.
231. Proceedings by appraisers.
232. Determination by surrogate.
233. Surrogate's assistants in New York city and Erie county.
234. Surrogate's assistant in Kings county.
235. Proceedings for the collection of taxes.
236. Receipt from the county treasurer and comptroller.
237. Fees of county treasurer and comptroller.
238. Books and forms to be furnished by the state comptroller.
239. Reports of surrogate and county clerk.
240. Reports of county treasurers and comptrollers of the city of New York.
241. Application of taxes.
242. Definitions.

SECTION 220. TAXABLE TRANSFERS.—A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of five hundred dollars or over, or of any interest therein or

income therefrom, in trust or otherwise, to persons or corporations not exempt by law from taxation on real or personal property, in the following cases:

1. When the transfer is by will or by the intestate laws of this state from any person dying seized or possessed of the property while a resident of the state.

2. When the transfer is by will or intestate law, of property within the state, and the decedent was a nonresident of the state, at the time of his death.

3. When the transfer is of property made by a resident or by a nonresident when such nonresident's property is within this state, by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death.

4. (Such tax shall be imposed) When any such person or corporation becomes beneficially entitled, in possession or expectancy, to any property or the income thereof by any such transfer, whether made before or after the passage of this act.

5. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer taxable under the provisions of this act in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will; and whenever any person or corporation possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this act shall be deemed to take place to the extent of such omissions or failure, in the same manner as though the persons or corporations thereby becoming entitled

to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure.

6. The tax imposed thereby shall be at the rate of five per centum upon the clear market value of such property, except as otherwise prescribed in the next section.

§ 221. EXCEPTIONS AND LIMITATIONS.—When the property or any beneficial interest therein passes by any such transfer to or for the use of any father, mother, husband, wife, child, brother, sister, wife or widow of a son or the husband of a daughter, or any child or children adopted as such in conformity with the laws of this state, of the decedent, grantor, donor or vendor or to any child to whom any such decedent, grantor, donor or vendor for not less than ten years prior to such transfer stood in the mutually acknowledged relation of a parent, provided, however, such relationship began at or before the child's fifteenth birthday and was continuous for said ten years thereafter, or to any lineal descendant of such decedent, grantor, donor or vendor born in lawful wedlock, such transfer of property shall not be taxable under this act, unless it is personal property of the value of ten thousand dollars or more, in which case it shall be taxable under this act at the rate of one per centum upon the clear market value of such property. But any property heretofore or hereafter devised or bequeathed to any person who is a bishop or to any religious corporation shall be exempted from and not subject to the provisions of this act.

§ 222. LIEN OF TAX AND PAYMENT THEREOF.—Every such tax shall be and remain a lien upon the property transferred until paid and the person to whom the property is so transferred, and the administrators, executors and trustees of every estate so trans-

ferred shall be personally liable for such tax until its payment. The tax shall be paid to the treasurer or the comptroller of the county of the surrogate having jurisdiction as herein provided; and said treasurer or comptroller shall give, and every executor, administrator or trustees, shall take duplicate receipts from him of such payment, one of which he shall immediately send to the comptroller of the state, whose duty it shall be to charge the treasurer or comptroller so receiving the tax with the amount thereof and to seal said receipt with the seal of his office and countersign the same and return it to the executor, administrator or trustee, whereupon it shall be a proper voucher in the settlement of his accounts; but no executor, administrator or trustee shall be entitled to a final accounting of an estate in settlement of which a tax is due under the provisions of this act, unless he shall produce a receipt so sealed and countersigned by the state comptroller or a copy thereof certified by him, or unless a bond shall have been filed as prescribed by section two hundred and twenty-six of this chapter. All taxes imposed by this article shall be due and payable at the time of the transfer, except as hereinafter provided. Taxes upon the transfer of any estate, property or interest therein limited, conditioned, dependent or determinable upon the happening of any contingency or future event by reason of which the fair market value thereof cannot be ascertained at the time of the transfer as herein provided, shall accrue and become due and payable when the persons or corporations beneficially entitled thereto shall come into actual possession or enjoyment thereof.

§ 223. DISCOUNT, INTEREST AND PENALTY.—If such tax is paid within six months from the accruing thereof, a discount of five per centum shall be allowed and deducted therefron. If such tax is not paid within eighteen months from the accruing thereof, interest shall be charged and collected thereon at the rate of ten per centum per annum

from the time the tax accrued; unless by reasons of claims made upon the estate, necessary litigation or other unavoidable cause of delay, such tax cannot be determined and paid as herein provided, in which case interest at the rate of six per centum per annum shall be charged upon such tax from the accrual thereof until the cause of such delay is removed, after which ten per centum shall be charged. In all cases when a bond shall be given under the provisions of section two hundred and twenty-six of this chapter, interest shall be charged at the rate of six per centum from the accrual of the tax until the date of payment thereof.

§ 224. COLLECTION OF TAX BY EXECUTORS, ADMINISTRATORS AND TRUSTEES.—Every executor, administrator or trustee, shall have full power to sell so much of the property of the decedent as will enable him to pay such tax in the same manner as he might be entitled by law to do for the payment of the debts of the testator or intestate. Any such administrator, executor or trustee having in charge or in trust any legacy or property for distribution subject to such tax shall deduct the tax therefrom; and within thirty days therefrom shall pay over the same to the county treasurer or comptroller, as herein provided. If such legacy or property be not in money, he shall collect the tax thereon upon the appraised value thereof from the person entitled thereto. He shall not deliver or be compelled to deliver any specific legacy or property subject to tax under this article to any person until he shall have collected the tax thereon. If any such legacy shall be charged upon or payable out of real property, the heir or devisee shall deduct such tax therefrom and pay it to the administrator, executor or trustee, and the tax shall remain a lien or charge on such real property until paid, and the payment thereof shall be enforced by the executor, administrator or trustee in the same manner that payment of the legacy might be enforced, or by the district attorney under

section two hundred and thirty-five of this chapter. If any such legacy shall be given in money to any such person for a limited period, the administrator, executor or trustee shall retain the tax upon the whole amount, but if it be not in money, he shall make application to the court having jurisdiction of an accounting by him, to make an apportionment, if the case require it, of the sum to be paid into his hands by such legatees, and for such further orders relative thereto as the case may require.

§ 225. REFUND OF TAX ERRONEOUSLY PAID.—If any debts shall be proven against the estate of a decedent after the payment of any legacy or distributive share thereof, from which any such tax has been deducted or upon which it has been paid by the person entitled to such legacy or distributive share, and such person is required by order of the surrogate having jurisdiction, on notice to the state comptroller, to refund the amount of such debts or any part thereof, an equitable proportion of the tax shall be repaid to him by the executor, administrator or trustee, if the tax has not been paid to the county treasurer, or comptroller of the city of New York, or if such tax has been paid to such treasurer or comptroller of the city of New York, he shall refund out of the funds in his hands or custody to the credit of such taxes such equitable proportion of the tax, and credit himself with the same in his quarterly account rendered to the comptroller of the state under this act. If after the payment of any tax in pursuance of an order fixing such tax, made by the surrogate having jurisdiction, such order be modified or reversed, on due notice to the comptroller of the state, the state comptroller shall, by order, direct and allow the treasurer of the county, or the comptroller of the city of New York, to refund to the executor, administrator, trustee, person or persons, by whom such tax had been paid, the amount of any moneys paid or deposited on account of such tax in excess of the amount of the tax fixed

by the order modified or reversed, out of the funds in his hands or custody, to the credit of such taxes, and to credit himself with the same in his quarterly account rendered to the comptroller of the state under this act; but no application for such refund shall be made after one year from such reversal or modification, and the comptroller of the state, shall deduct from the fees allowed by this article to the comptroller of the city of New York or the county treasurer the amount theretofore allowed him upon such overpayment. Where it shall be proved to the satisfaction of the surrogate who has assessed the tax upon the transfer of property under this article that deductions for debts were allowed upon the appraisal, since proved to have been erroneously allowed, it shall be lawful for such surrogate to enter an order assessing the tax upon the amount wrongfully or erroneously deducted.

§ 226. DEFERRED PAYMENT.—Any person or corporation beneficially interested in any property chargeable with a tax under this article, and executors, administrators and trustees thereof may elect within eighteen months from the date of the transfer thereof as herein provided, not to pay such tax until the person or persons beneficially interested therein shall come into the actual possession or enjoyment thereof. If it be personal property, the person or persons so electing shall give a bond to the state in penalty of three times the amount of any such tax, with such sureties as the surrogate of the proper county may approve, conditioned for the payment of such tax and interest thereon, at such time or period as the person or persons beneficially interested therein may come into the actual possession or enjoyment of such property, which bond shall be filed in the office of the surrogate. Such bond must be executed and filed and a full return of such property upon oath made to the surrogate within one year from the date of transfer

thereof as herein provided, and such bond must be renewed every five years.

§ 227. TAXES UPON DEVISES AND BEQUESTS IN LIEU OF COMMISSIONS.—If a testator bequeaths or devises property to one or more executors or trustees in lieu of their commissions or allowances, or makes them his legatees to an amount exceeding the commissions or allowances prescribed by law for an executor or trustee, the excess in value of the property so bequeathed or devised, above the amount of commissions or allowances prescribed by law in similar cases shall be taxable under this article.

§ 228. LIABILITY OF CERTAIN CORPORATIONS TO TAX.—If a foreign executor, administrator or trustee shall assign or transfer any stock or obligations in this state standing in the name of a decedent, or in trust for a decedent, liable to any such tax, the tax shall be paid to the treasurer of the proper county or the comptroller of the city of New York on the transfer thereof. No safe deposit company, bank or other institution, person or persons holding securities or assets of a decedent, shall deliver or transfer the same to the executors, administrators or legal representatives of said decedent unless notice of the time and place of such intended transfer be served upon the county treasurer or comptroller at least five days prior to the said transfer. And it shall be lawful for the said county treasurer or comptroller, personally or by representative, to examine said securities or assets at the time of such delivery or transfer. Failure to serve such notice or to allow such examination shall render said safe deposit company, trust company, bank or other institution, person or persons liable to the payment of the tax due upon said securities or assets in pursuance of the provisions of this article.

§ 229. JURISDICTION OF THE SURROGATE.—The surrogate's court of every county of the state having

jurisdiction to grant letters testamentary or of administration upon the estate of a decedent whose property is chargeable with any tax under this article, or to appoint a trustee of such estate or any part thereof, or to give ancillary letters thereon, shall have jurisdiction to hear and determine all questions arising under the provisions of this article, and to do any act in relation thereto authorized by law to be done by a surrogate in other matters or proceedings coming within his jurisdiction; and if two or more surrogates' courts shall be entitled to exercise any such jurisdiction, the surrogate first acquiring jurisdiction hereunder shall retain the same to the exclusion of every other surrogate. Every petition for ancillary letters testamentary or ancillary letters of administration made in pursuance of the provisions of article seven, title three, chapter eighteen of the code of civil procedure shall set forth the name of the county treasurer or comptroller as a person to be cited as therein prescribed, and a true and correct statement of all the decedent's property in this state and the value thereof; and upon the presentation thereof the surrogate shall issue a citation directed to such county treasurer or comptroller; and upon the return of the citation the surrogate shall determine the amount of the tax which may be or become due under the provisions of this article and his decree awarding the letters may contain any provision for the payment of such tax or the giving of security therefor which might be made by such surrogate if the county treasurer or comptroller were a creditor of the decedent.

§ 230. APPOINTMENT OF APPRAISERS.—The surrogate, upon the application of any interested party, including the state comptroller, county treasurers, or the comptroller of New York city, or upon his own motion, shall, as often as, and whenever occasion may require, appoint a competent person as appraiser, to fix the fair market value (at the time of the transfer thereof) of property of persons whose

estates shall be subject to the payment of any tax imposed by this article. If the property upon the transfer of which a tax is imposed shall be an estate, income or interest, or shall be a remainder or reversion or other expectancy, real or personal, the title to which is fixed, absolute and indefeasible, such estate or estates shall be appraised immediately after such transfer, or as soon thereafter as may be practicable, at the fair and clear market value thereof at that time; provided, however, that when such estate, income or interest shall be of such a nature that its fair and clear market value can not be ascertained at such time, it shall be appraised in like manner at the time when such value first becomes ascertainable. Estates in expectancy which are contingent or defeasible shall be appraised at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof, without diminution for or on account of any valuation theretofore made of the particular estates for purposes of taxation, upon which said estates in expectancy may have been limited. The value of every future or limited estate, income, interest or annuity dependent upon any life or lives in being, shall be determined by the rule, method and standard of mortality and value employed by the superintendent of insurance in ascertaining the value of policies of life insurance and annuities for the determination of liabilities of life insurance companies, except that the rate of interest for making such computation shall be five per centum per annum. In estimating the value of any estate or interest in property, to the beneficial enjoyment or possession whereof there are persons or corporations presently entitled thereto, no allowance shall be made in respect of any contingent incumbrance thereon, nor in respect of any contingency upon the happening of which the estate or property or some part thereof or interest therein might be abridged, defeated or diminished; provided, however, that in the event of such incumbrance taking

effect as an actual burden upon the interest of the beneficiary, or in the event of the abridgment, defeat or diminution of said estate or property or interest therein as aforesaid, a return shall be made to the person properly entitled thereto of a proportionate amount of such tax in respect of the amount or value of the incumbrance when taking effect, or so much as will reduce the same to the amount which would have been assessed in respect of the actual duration or extent of the estate or interest enjoyed. Such return of tax shall be made in the manner provided by section two hundred and twenty-five of this article. Where any property shall, after the passage of this act, be transferred subject to any charge, estate or interest, determinable by the death of any person, or at any period ascertainable only by reference to death, the increase of benefit accruing to any person or corporation upon the extinction or determination of such charge, estate or interest shall be deemed a transfer of property taxable under the provisions of this act in the same manner as though the person or corporation beneficially entitled thereto had then acquired such increase of benefit from the person from whom the title to their respective estates or interests is derived. When property is devised or bequeathed in trust for persons in succession who are all liable to taxation at the same rate, it shall be lawful for the trustees thereof to pay out of the principal of the trust fund or property the taxes to which the particular estates and the expectant estates limited thereon may be respectively liable; and when such remainders or expectant estates shall be of such a nature or so disposed and circumstanced that the taxes thereon shall not be presently payable under the provisions of this act, or when property is devised or bequeathed in trust for persons in succession who are not liable at the same rate; or where some of the persons taking in succession are exempt, it shall, nevertheless, be lawful for county treasurers and the comptroller of New York city, by and with the consent of the comptroller of the

state, expressed in writing, to agree with such trustees and to compound such taxes upon such terms as may be deemed equitable and expedient and to grant discharges to said trustees upon payment of the taxes provided for in such compositions; provided, however, that no such composition shall be conclusive in favor of such trustees as against the interest of such cestuis que trustent as may possess either present rights of enjoyment or fixed, absolute and indefeasible rights of future enjoyment, or of such as would possess such rights in the event of the immediate termination of particular estates, unless they consent thereto, either personally when competent, or by guardian or committee. Such compositions when made shall be executed in triplicate and one copy shall be filed in the office of the comptroller of the state, one copy in the office of the surrogate and one copy be delivered to the trustees who shall be parties thereto.

§ 231. PROCEEDINGS BY APPRAISERS.—Every such appraiser shall forthwith give notice by mail to all persons known to have a claim or interest in the property to be appraised, including the county treasurer or comptroller, and to such persons as the surrogate may by order direct, of the time and place when he will appraise such property. He shall, at such time and place, appraise the same at its fair market value, as herein prescribed, and for that purpose the said appraiser is authorized to issue subpœnas and to compel the attendance of witnesses before him and to take the evidence of such witnesses under oath concerning such property and the value thereof; and he shall make report thereof and of such value in writing, to the said surrogate, together with the depositions of the witnesses examined, and such other facts in relation thereto and to the said matter as said surrogate may order or require. Every appraiser shall be paid on the certificate of the surrogate at the rate of three dollars per day for every day actually and necessarily em-

ployed in such appraisal, and his actual and necessary traveling expenses and the fees paid such witnesses, which fees shall be the same as those now paid to witnesses subpœnaed to attend in courts of record, by the county treasurer or comptroller out of any funds he may have in his hands on account of any tax imposed under the provisions of this article.

§ 232. DETERMINATION OF SURROGATE.—The report of the appraiser shall be made in duplicate, one of which duplicates shall be filed in the office of the surrogate and the other in the office of the state comptroller. From such report and other proof relating to any such estate before the surrogate, the surrogate shall forthwith, as of course, determine the cash value of all estates and the amount of tax to which the same are liable; or the surrogate may so determine the cash value of all such estates and the amount of tax to which the same are liable, without appointing an appraiser. The superintendent of insurance shall, on the application of any surrogate, determine the value of any such future or contingent estates, income or interest therein limited, contingent, dependent or determinable upon the life or lives of persons in being, upon the facts contained in any such appraiser's report, and certify the same to the surrogate, and his certificate shall be conclusive evidence that the method of computation adopted therein is correct. The comptroller of the state of New York or any person dissatisfied with the appraisement or assessment and determination of tax, may appeal therefrom to the surrogate, within sixty days from the fixing, assessing and determination of tax by the surrogate as herein provided, upon filing in the office of the surrogate a written notice of appeal, which shall state the grounds upon which the appeal is taken. The surrogate shall immediately give notice, upon the determination by him as to the value of any estate which is taxable under this article, and of the tax to which it is liable, to all parties

known to be interested therein, including the state comptroller. Within two years after the entry of an order or decree of a surrogate determining the value of an estate and assessing the tax thereon, the comptroller of the state may, if he believes that such appraisal, assessment or determination has been fraudulently, collusively, or erroneously made, make application to a justice of the supreme court of the judicial district in which the former owner of such estate resided, for a reappraisal thereof. The justice to whom such application is made may thereupon appoint a competent person to reappraise such estate. Such appraiser shall possess the powers, be subject to the duties and receive the compensation provided by sections two hundred and thirty and two hundred and thirty-one of this article. Such compensation shall be payable by the county treasurer or comptroller, out of any funds he may have on account of any tax imposed under the provisions of this article, upon the certificate of the justice appointing him. The report of such appraiser shall be filed with the justice by whom he was appointed, and thereafter the same proceedings shall be taken and had by and before such justice as herein provided to be taken and had by and before the surrogate. The determination and assessment of such justice shall supersede the determination and assessment of the surrogate, and shall be filed by such justice in the office of the state comptroller and a certified copy thereof transmitted to the surrogate's court of the proper county.

§ 233. SURROGATE'S AND DISTRICT ATTORNEY'S ASSISTANTS IN NEW YORK CITY AND ERIE COUNTY.—The comptroller of the city and county of New York shall retain, out of any funds he may have in his hands on account of said tax, a sum of money sufficient to provide the surrogates in the city and county of New York with an assistant, appointed by said surrogates, who shall be known as the transfer tax assistant, whose salary shall be four thousand dol

lars a year; a transfer tax clerk, whose salary shall be two thousand four hundred dollars a year; an assistant clerk, whose salary shall be one thousand eight hundred dollars a year, and a recording clerk, whose salary shall be one thousand three hundred dollars a year, said salaries to be paid monthly; and a further sum of money, not exceeding five hundred dollars a year, to be used to pay the expenses of the said surrogates, necessarily incurred in the assessment and collection of said tax, said amounts to be paid upon the certificates and requisitions of said surrogates respectively. The comptroller of the city and county of New York shall also retain, out of any funds he may have in his hands on account of said tax, a sum of money sufficient to provide the district attorney in the city and county of New York with an assistant, appointed by said district attorney, who shall be known as the transfer tax assistant, whose salary shall be there thousand dollars a year; a transfer tax clerk whose salary shall be two thousand four hundred dollars a year, and a surrogate's process server, whose salary shall be one thousand two hundred dollars a year, said salary to be payable monthly; and a further sum of money not exceeding five hundred dollars a year, to be used to pay the expenses of the said district attorney, for the conduct and prosecution of the proceedings mentioned in section two hundred and thirty-five of this chapter, said amounts to be paid upon the certificate and requisition of said district attorney. The county treasurer of the county of Erie shall also retain out of any funds he may have in his hands on account of said tax, a sum of money sufficient to provide the district attorney in the county of Erie with an assistant, appointed by the said district attorney, who shall be known as the transfer tax assistant, whose salary shall be twenty-five hundred dollars a year, said salary to be paid monthly.

§ 234. SURROGATE'S ASSISTANTS IN KINGS COUNTY.—The county treasurer of the county of Kings shall, from time to time, retain out of any funds which he may have in his hands, on account of taxes collected under this article, a sum of money sufficient to provide the surrogate of the county of Kings with an assistant, to be known as the transfer tax assistant and a transfer tax clerk. Such assistants shall be appointed by the surrogate, and the transfer tax assistant shall receive an annual salary of four thousand dollars, and the transfer tax clerk, an annual salary of two thousand dollars. Such salaries shall be payable monthly. Such county treasurer shall also retain, out of such funds, a further sum not exceeding five hundred dollars in any one year, for the necessary expenses of such surrogate, in the assessment and collection of such tax. Such salaries and said amount shall be paid upon the certificate and requisitions of such surrogate, respectively.

§ 235. PROCEEDINGS FOR THE COLLECTION OF TAXES.—If the treasurer or comptroller of any county shall have reason to believe that any tax is due and unpaid under this article, after the refusal or neglect of the persons liable therefor to pay the same, he shall notify the district attorney of the county, in writing, of such failure or neglect, and such district attorney, if he have probable cause to believe that such tax is due and unpaid, shall apply to the surrogate's court for a citation, citing the persons liable to pay such tax to appear before the court on the day specified, not more than three months after the date of such citation, and show cause why the tax should not be paid. The surrogate, upon such application, and whenever it shall appear to him that any such tax accruing under this article has not been paid as required by law, shall issue such citation and the service of such citation, and the time, manner and proof thereof, and

the hearing and determination thereon and the enforcement of the determination or order made by the surrogate shall conform to the provisions of the code of civil procedure for the service of citations out of the surrogate's court, and the hearing and determination thereon and its enforcement so far as the same may be applicable. The surrogate or his clerk shall, upon request of the district attorney, treasurer or comptroller of the county or the comptroller of the state, furnish, without fee, one or more transcripts of such decree, which shall be docketed and filed by the county clerk of any county of the state without fee, in the same manner and with the same effect as provided by law for filing and docketing transcripts of decrees of the surrogate's court. The costs awarded by any such decree after the collection and payment of the tax to the treasurer or comptroller may be retained by the district attorney for his own use. Such costs shall be fixed by the surrogate in his discretion, but shall not exceed in any case where there has not been a contest, the sum of one hundred dollars, or where there has been a contest the sum of two hundred and fifty dollars. Whenever the surrogate shall certify that there was probable cause for issuing a citation and taking the proceedings specified in this section, the state treasurer shall pay or allow to the treasurer or the comptroller of a county all expenses incurred for the service of citations and other lawful disbursements not otherwise paid. In proceedings to which any county treasurer or comptroller is cited as a party under sections two hundred and thirty and two hundred and thirty one of this article, the state comptroller is authorized to designate and retain counsel to represent such county treasurer or comptroller therein, and to direct such county treasurer or comptroller to pay the expenses thereby incurred out of the funds which may be in his hands on account of this tax. And the comptroller of the state is hereby authorized, with the

approval of the attorney-general, and a justice of the supreme court of the judicial district in which the former owner resided, to compromise and settle the amount of such tax in any case where controversies have arisen or may hereafter arise as to the relationship of the beneficiaries to the former owner thereof.

§ 236. RECEIPT FROM THE COUNTY TREASURER AND COMPTROLLER.—Any person shall upon the payment of the sum of fifty cents be entitled to a receipt from the county treasurer of any county or the comptroller of the city of New York, or at his option to a copy of a receipt that may have been given by such treasurer or comptroller for the payment of any tax under this article, under the official seal of such treasurer or comptroller, which receipt shall designate upon what real property, if any, of which any decedent may have died seized, such tax shall have been paid, by whom paid, and whether in full of such tax. Such receipt may be recorded in the clerk's office of the county in which such property is situate, in a book to be kept by him for that purpose, which shall be labeled " transfer tax."

§ 237. FEES OF COUNTY TREASURER AND COMPTROLLER.—The treasurer of each county and the comptroller of the city and county of New York, shall be allowed to retain on all taxes paid and accounted for by him each year, under this article, five per centum on the first fifty thousand dollars, three per centum on the next fifty thousand dollars, and one per centum on all additional sums. Such fees shall be in addition to the salaries and fees now allowed by law to such officers, except that in the county of Monroe such per centum shall be credited to and belong to the county where collected.

§ 238. BOOKS AND FORMS TO BE FURNISHED BY THE STATE COMPTROLLER.—The comptroller of the state

shall furnish to each surrogate, a book, which shall be a public record, and in which he shall enter the name of every decedent upon whose estate an application to him has been made for the issue of letters of administration, or letters testamentary, or ancillary letters, the date and place of death of such decedent, the estimated value of his real and personal property, the names, places, residence and relationship to him of his heirs-at-law, the names and places of residence of the legatees and devisees in any will of any such decedent, the amount of each legacy and the estimated value of any real property devised therein, and to whom devised. These entries shall be made from the data contained in the papers filed on any such application, or in any proceeding relating to the estate of the decedent. The surrogate shall also enter in such book the amount of the personal property of any such decedent, as shown by the inventory thereof when made and filed in his office, and the returns made by any appraiser appointed by him under this article, and the value of annuities, life estates, terms of years, and other property of any such decedent or given by him in his will or otherwise, as fixed by the surrogate, and the tax assessed thereon, and the amounts of any receipts for payment of any tax on the estate of such decedent under this article filed with him. The state comptroller shall also furnish to each surrogate forms for the reports to be made by such surrogate, which shall correspond with the entries to be made in such book.

§ 239. REPORTS OF SURROGATE AND COUNTY CLERK.—Each surrogate shall, on January, April, July and October first of each year, make a report in duplicate, upon the forms furnished by the comptroller containing all the data and matters required to be entered in such books, one of which shall be immediately delivered to the county treasurer or comptroller and the other transmitted to the state comptroller. The county clerk of each county shall,

at the same times, make reports in duplicate, containing a statement of any deed or other conveyance filed or recorded in his office, of any property, which appears to have been made or intended to take effect in possession or enjoyment after the death of the grantor or vendor, with the name and place of residence of such grantor or vendor, the name and place of residence of the grantee or vendee, and a description of the property transferred, one of which duplicates shall be immediately delivered to the county treasurer or comptroller and the other transmitted to the state comptroller.

§ 240. Reports of county treasurer and of the comptroller of the city of New York.—Each county treasurer and the comptroller of the city of New York shall make a report, under oath, to the state comptroller, on January, April, July and October first of each year, of all taxes received by him under this article, stating for what estate and by whom and when paid. The form of such report may be prescribed by the state comptroller. He shall, at the same time, pay the state treasurer all taxes received by him under this article and not previously paid into the state treasury, and for all such taxes collected by him and not paid into the state treasury within thirty days from the times herein required, he shall pay interest at the rate of ten per centum per annum.

§ 241. Application of taxes.—All taxes levied and collected under this article shall be paid into the treasury of the state for the use of the state, and shall be applicable to the expenses of the state government and to such other purposes as the legislature shall by law direct.

§ 242. Definitions.—The words "estate" and "property," as used in this article, shall be taken to mean the property or interest therein of the testator, intestate, grantor, bargainor or vendor, passing or

transferred to those not herein specifically exempted from the provisions of this article and not as the property or interest therein passing or transferred to individual legatees, devisees, heirs, next of kin, grantees, donees or vendees, and shall include all property or interest therein, whether situated within or without this state. The word "transfer," as used in this article, shall be taken to include the passing of property or any interest therein in possession or enjoyment, present or future, by inheritance, descent, devise, bequest, grant, deed, bargain, sale or gift, in the manner herein prescribed. The words "county treasurer," "comptroller" and "district attorney," as used in this article, shall be taken to mean the treasurer, comptroller or district attorney of the county of the surrogate having jurisdiction as provided in section two hundred and twenty-nine of this article.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., January 3, 1900.

Messrs. EVARTS, CHOATE AND BEAMAN,
New York, N. Y.

GENTLEMEN:

In response to your telegraphic request of this date, I enclose herewith a copy of the latest debt statement giving the total amount of bonds outstanding and the amounts issued under each act. I also enclose copy of a document addressed to the Senate of the United States in response to a resolution, said document giving a copy of each obligation of the United States issued since 1792, with the exception of the three per cent. loan of 1898. The text of the three per cent. bonds as to the clause exempting them from taxation is as follows: "The principal and interest are exempt from all taxes or duties of the United States as well as from taxation in any form by or under State, municipal or local authority." *Each bond of the United States now outstanding, whether registered or coupon, contains the exemption clause above quoted or stated in the document herewith enclosed.*

Respectfully yours,

L. J. GAGE,
Secretary.

[*We have inserted the Debt Statement of January* 31, 1900, *instead of that of December* 31, 1899.]

STATEMENT OF THE PUBLIC DEBT

AND OF THE

CASH IN THE TREASURY OF THE UNITED STATES

FOR THE MONTH OF JANUARY, 1900.

INTEREST-BEARING DEBT.

Title of Loan.	Authorizing Act.	Rate.	When Redeemable.	Amount Issued.	Outstanding January 31, 1900.		
					Registered.	Coupon.	Total.
n of July 12, 1882	July 12, 1882.....	3 per cent.....	Option U. S.	$305,529,000 00	.....	.....	.....
ded Loan of 1891.....	July 14, '70, and Jan. 20, '71.....	4½ per cent. ..... Cont'd at 2%	September 1, 1891... Option U. S.....	250,000,000 00	..... $25,364,500 00	....	..... $25,364,500 00
ded Loan of 1907.....	July 14, '70, and Jan. 20, '71.....	4 per cent.....	July 1, 1907	740,915,550 00	478,969,500 00	$66,375,850 00	545,345,350 00
unding Certificates...	February 26, 1879	4 per cent.	.....	40,012,750 00	.....	.....	36,660 00
n of 1904	January 14, 1875.....	5 per cent.	February 1, 1904	100,000,000 00	65,445,650 00	29,564,050 00	93,009,700 00
n of 1925.....	do	4 per cent.	February 1, 1925	162,315,400 00	118,197,250 00	44,118,150 00	162,315,400 00
-Twenties of 1898.....	June 13, 1898.....	3 per cent.	After Aug. 1, 1908.....	198,791,440 00	111,819,840 00	86,971,600 00	198,791,440 00
	Aggregate of Interest	Bearing Debt	.....	$1,797,564,140 00	$799,736,740 00	$227,029,650 00	$1,026,863,050 00

[Of the following document, referred to in the Secretary's letter, we print only the material portions, including only the form of the bonds, like those in the case at bar, issued under the Refunding Act, and now outstanding.]

54th Congress, 1st Session. SENATE. Document No. 154.

"IN THE SENATE OF THE UNITED STATES.

March 9, 1896.—Referred to the Committee on Finance and ordered to be printed.

The Vice-President presented the following:

LETTER FROM THE SECRETARY OF THE TREASURY, TRANSMITTING, IN RESPONSE TO RESOLUTION OF THE SENATE, DATED DECEMBER 31, 1895, THAT THE SECRETARY OF THE TREASURY BE DIRECTED TO REPORT TO THE SENATE A STATEMENT CONTAINING A COPY OF EACH OBLIGATION OF THE GOVERNMENT SINCE MARCH 4, 1789, ETC., PAPERS CALLED FOR BY SAID RESOLUTION.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, D. C., March 5, 1896.

SIR.—I have the honor to transmit herewith, in response to the Senate resolution dated December 31, 1895, receipt of which was acknowledged January 8, 1896, the papers called for by said resolution, which was as follows:

> *Resolved*, That the Secretary of the Treasury be, and he is hereby, directed to report to the Senate a statement containing a copy of each obligation issued by the Government since March 4, 1789, with a reference by title and date to the laws respectively authorizing

such issues, and showing the amount of each issue and the amount now outstanding, properly classified, and including Treasury notes of every kind, bonds and certificates for currency, silver, and gold.

I also enclose copy of a letter on the subject from the Register of the Treasury, dated February 25, 1896.

* * * * * *

Respectfully yours,

J. G. CARLISLE, *Secretary.*

The PRESIDENT OF THE SENATE.

TREASURY DEPARTMENT,
OFFICE OF THE REGISTER,
Washington, D. C., February 25, 1896.

SIR: On January 13 I received from you a resolution passed by the United States Senate on December 31, 1895, as follows:

> *Resolved*, That the Secretary of the Treasury be, and he is hereby, directed to report to the Senate a statement containing a copy of each obligation issued by the Government since March 4, 1789, with a reference by title and date to the laws respectively authorizing such issues, and showing the amount of each issue and the amount now outstanding, properly classified, and including Treasury notes of every kind, bonds and certificates for currency, silver and gold.

In reply to the foregoing resolution, which is herewith returned, I have the honor to transmit the accompanying report. It contains a table showing the amount of all obligations of the Government since March 4, 1789, classified by loans, and with appropriate references to the volumes and pages of the authorizing acts as given in the Revised Statutes. The table also shows the amount which on January 1, 1896, appeared to be outstanding under each class

of security, as shown by the books of the Department.

Probably some of the issues are not those contemplated by the resolution, but it was deemed wiser to make the table include all the loans of the Government than to attempt to construe the meaning of the resolution. The tables include the three loans of the District of Columbia issued under authority of acts of Congress. In several cases it should be understood that the amounts given as issues include a large amount which may be classed as reissues.

I have also given, as fully as could be done, *copies of each kind of obligations which have been issued by the Government.* This series is believed to be complete for all issues subsequent to 1822, and it includes several of the most important issues of an earlier date. Coupon bonds were not used in connection with the earlier issues of the Government, but in issues which include both coupon and registered bonds it has been considered to meet the purpose of the resolution to give a copy of either, but not of both. It has not been considered necessary to give a copy of more than one denomination. On the earlier loans (with some exceptions) it was not customary to print the denominations, and the amount for which a bond was issued was written in with a pen.

Since 1847 *it has been customary to print on the back of registered bonds a blank form for convenience in making assignments.* As these are *almost identical in phraseology*, and constitute no part of the obligation of the Government, it has been considered unnecessary to repeat the form with each bond. *An example of this form may be found with the* 4 *per cent. consol bond of* 1907.

* * * * * *

Respectfully yours,

J. F. TILLMAN,
Register.

Hon. JOHN G. CARLISLE,
Secretary of the Treasury."

* * * * * *

"*Four per cent loan of 1907, consols.*

(Face of bond.)

1877 1907. M

FOUR PER CENT CONSOLS OF THE UNITED STATES.

A 4

Washington, July 1st, 1877.

Principal and interest payable in coin One M Thousand at the Treasury of the United States.

THE UNITED STATES OF AMERICA

Are indebted to.....*or assigns*, in the sum of One Thousand Dollars. This bond is issued in accordance with the provisions of an act of Congress entitled "An act to authorize the refunding of the National Debt, approved July 14, 1870," amended by an act approved January 20, 1871, and is redeemable at the pleasure of the United States after the first day of July, A. D. 1907, in coin of the standard value of the United States on said July 14, 1870, with interest, in such coin, from the day of the date hereof, at the rate of four per centum per annum, payable quarterly, on the first day of October, January, April, and July in each year. *The principal and interest are exempt from the payment of all taxes or duties of the United States, as well as from taxation in any form by or under State, municipal or local authority. Transferable on the books of this Office.*

Date of issue.....

Entered .....

Recorded .....

.....

Register of the Treasury.

Act of July 14th, 1870.

(Back of Bond.)

Act of July 14th, 1870. Amended January 20th, 1871

TRANSFER (NO.....).

Original Date.... Original No.....

1000 FOUR PER CENT. CONSOLS. 1877–1907.

For value received, ...*assign to*..... the within registered bond of the United States, and hereby authorize the transfer thereof on the books of the Treasury Department.

Dated....., 18..

State of ....., County of ....., Town of.....

Personally appeared before me the above named *assignor*, known or proved to me to be the ..... payee of the within bond, and signed the above transfer, acknowledging the same to be his free act or deed.

Witness my hand, official designation, and seal.

.....

NOTE.—The execution and acknowledgment of *the above assignment*, when not made at the Treasury Department, must be before a U. S. Judge, U. S. district attorney, clerk of a U. S. court, collector of customs, collector or assessor of internal revenue, U. S. Treasurer or Assistant Treasurer, or the president or cashier of a national bank, or, if in a foreign country, before a U. S. minister or consul. In all cases the officer must add his official designation, residence and seal if he has one. When the *assignment* is made by a corporation, it must be named as the assignor; *when by a guardian, trustee, executor, administrator*, an officer of a corporation, *or any one in a representative capacity*, proof of his authority to act must be produced to the officer before whom *the assignment* is made and must accompany the bond. *Assignors* must be identified as known and resposible persons to the satisfaction of the officer.

One Thousand."

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

HARRY PLUMMER, as Executor, &c., of JOSEPH PLUMMER, deceased,
Plaintiff in Error,

AGAINST

BIRD S. COLER, Comptroller of the City of New York,
Defendant in Error.

No. 489.

BRIEF FOR DEFENDANT IN ERROR.

The sole question presented is whether United States Bonds can be appraised to ascertain the value of a succession under the Taxable Transfer Law of New York in order to fix the tax on the succession.

STATEMENT.

Joseph Plummer, a resident of New York, died October 24, 1898. By his will he gave a legacy of $40,000 to his daughter, Ella Plummer Brown, for life, with a gift over on her death. The value of this life estate has been computed and a tax amounting to $161.20 was imposed on this succession by the Surrogate. The entire estate consisted of United States Bonds issued under the Funding Act of 1870. This Act provided that the bonds and the interest thereon shall be exempt "from

taxation in any form by or under State, Municipal or local authority, and the said bonds shall have set forth and expressed upon their face the above specified condition." The bonds, in accordance with this provision contained a clause to the effect that the principal and interest are exempt from taxation in any form by or under State, Municipal or local authority. (Record, p. 12.)

The Surrogate held that as the tax was not upon the bonds, but upon the value of the succession, viz., the right given by the State to the decedent to dispose of his property by will or to the legatee to receive it—the bonds were not taxed, but were appraised simply to determine the value of this right of succession. (Opinion, Record, pp. 13 and 14.) This determination having been affirmed by the Court of Appeals, the case is brought by the executor of Joseph Plummer to this Court, who assigns as error: (1) that the State of New York has no power to impose any tax upon said bonds or any interest thereon or upon the transfer thereof by the will of Joseph Plummer. (2) That the tax law "*in imposing a tax upon said bonds*" is repugnant to the Constitution and laws of the United States of America on the ground that they impair the power of the United States to borrow money (3) That the tax law *in imposing a tax on said bonds* impaired the obligation of the contract contained in said bonds, which exempts the principal and interest thereof from taxation in any form by the State; and (4) that the tax law *in imposing the tax on said bonds* violated the Funding Act of 1870, by which said bonds were exempted from taxation in any form by said State.

It will be contended by the State in reply that none of the assignments of error are well taken, because no tax has been imposed upon the bonds themselves, but the tax has been imposed upon the value of the privilege conferred by the State upon Miss Plummer of succeeding to the property, and that only this privilege of succession has been taxed, the bonds having been valued simply to determine the value of this privilege.

POINTS.

I.

THE TAX IMPOSED BY THE TAXABLE TRANSFER LAW IS NOT UPON THE PROPERTY ITSELF, BUT UPON THE VALUE OF THE PRIVILEGE OF SUCCESSION. THE SUCCESSION TO PROPERTY BY WILL IS REGULATED BY LOCAL LAW, AND IN GRANTING THAT PRIVILEGE THE STATE HAS THE RIGHT TO IMPOSE AS A CONDITION THE PAYMENT OF A TAX OR BONUS TO ITSELF.

(*a.*) The Act itself imposes a tax "upon the transfer of any property," when the transfer is by will * * * from a resident of the State (§220 and subd. 1).

By Section 220 the appraiser is to fix the "fair market value" of the property transferred, and Section 221 (in case of children) provides, that such transfer of property shall be taxable at the rate of 1% upon the clear market value of such property." These provisions, as well as all the provisions of the Act, show that the tax is not on the bonds, but on the privilege of succession conferred by the State upon the legatee of taking by the will, the bonds being appraised simply to ascertain the value of this privilege thus granted by the State, so that the amount of the tax can be fixed.

Plaintiff in error contends that, because the tax is made a lien on the property (§222), and because the executors may sell property to pay the tax and cannot be compelled to transfer a specific legacy until he collects from the legatee the tax (§224), the whole theory of the Act is changed from a tax upon the value of the privilege of succession to a specific tax upon property. This is not so. They are simply provisions or methods to secure to the State the payment of the tax, and do not change its character from a tax or excise upon the value of the privilege of succession to a specific tax upon the property.

In *Scholey* v. *Rew*, 23 Wall., 331, the same claim was made, that, because the War Revenue Act of 1864 provided that the tax imposed should be a lien upon the real estate, therefore the tax must be upon the property, and not upon the succession

to the property. In overruling this objection and in holding that the tax was upon the succession, Mr. Justice Clifford says, at page 247:

> "Nor is this question affected in the least by the fact that the tax or duty is made a lien upon the land, as the lien is simply an appropriate regulation to secure the collection of the exaction."

All of these provisions were in the Illinois Statute. Thus in that Act, §4 provided that the executor shall deduct the tax from the legacy, or if a specific legacy, collect it from the legatee, and he could not be compelled to deliver a legacy till the legatee paid the tax; §5 provided that the executor could sell for payment of taxes, and §22 made the tax a lien till paid. Nevertheless, this Court in Magoun *v.* Illinois State and Savings Bank, 170 U. S., 283, held the Illinois Inheritance Tax Law, which is identical with the one in question, did not impose a tax on property, but on the privilege of succession. The present Transfer Law of New York is but a codification of the prior Inheritance Laws, and these provisions relied on are not new. This §222 was §3 of the Act of 1892, and §224 was §6 and §7 of the Act of 1887, ch. 713, and §5 of the Act of 1892. The latter provision was in the Act of New York before this Court in *United States* v. *Perkins,* 163 U. S., 625, affirming 141 N. Y., 479, where it was distinctly held that the tax was not upon property, but upon the privilege conferred by the State to succeed to it.

In the *Matter of Hoffman,* 143 N. Y., 327, in speaking of the Transfer Act in the form it is quoted in appellant's brief, Judge Finch says, at page 331:

> "There are some changes of phraseology in the more important sections, but I think it remains true that the tax is one upon the right of succession, levied upon the successors in respect to the shares to which they succeeded, and not upon decedent's estate as such."

(*b.*) It is not an open question:

(1.) That an Inheritance Tax is not one on property, but one on the privilege of succession.

(2.) That the right to take property by devise or descent is the creature of the law of the State and not a natural right—a privilege—and therefore the authority which confers it may impose conditions upon it.

Such is the law of this Court.

United States v. *Perkins*, 163 U. S., 625, affirming 141 N. Y., 479.
Magoun v. *Ill. Trust & Savings Bank*, 170 U. S., 283.

The Courts of New York have uniformly construed its Transfer Law as not imposing a tax on property, but on the value of the privilege of succession created by the State.

Matter of Sherman, 153 N. Y., 5.
Matter of Merriam, 141 N. Y., 479.
Matter of Hoffman, 143 N. Y., 329.
Matter of Bronson, 150 N. Y., at pp. 6 and 16.
Matter of Swift, 137 N. Y., 77.
Matter of Davis, 149 N. Y., 546.

"The construction by the Courts of a State of its constitution and statutes is, as a general rule, binding on the Federal Courts. We may think that the Supreme Court of a State has misconstrued its constitution or its statutes, but we are not at liberty to therefore set aside its judgment. That Court is the final arbiter as to such questions."

Justice Brewer in *Forsyth* v. *Hammond*, 166 U. S., at p. 518, and cases cited at p. 519.

In *Leffingwell* v. *Warren*, 2 Black, 599, 603, Justice Swayne says at p. 603, "the construction given to a statute of a State by the highest judicial tribunal of such State is regarded as a part of the statute and is as binding upon the Courts of the United States as the text."

The same construction has uniformly been given by other States to similar Inheritance Law.

In re. Wilmerding, 117 Cal,. 281.
State v. *Alston*, 94 Tenn., 674.
State v. *Hamlin*, 86 Me., 495.
State v. *Dalrymple*, 70 Md., 294.

Eyre v. *Jacob,* 14 Grat., 442.
Minot v. *Winthrop,* 162 Mass., 113.
Drake v. *Kochersferger,* 167 Ill., 125.

The theory of Transfer Taxes has been so recently examined by this Court and all the cases so thoroughly examined, that it is not deemed necessary to cite from any of the cases except those decided in this Court.

In *United States* v. *Perkins,* 163 U. S., 625, it was held that it was within the power of the State of New York to tax a bequest to the United States, Judge Brown saying at page 627:

> "While the laws of all civilized states recognize in every citizen the absolute right to his own earnings and to the enjoyment of his own property, and to the increase thereof during his life except so far as the state may require him to contribute his share for public expenses, the right to dispose of his property by will has always been considered purely a creature of statute and within legislative control."

Judge Brown then shows that by the laws of various countries from early days testamentary dispositions were regulated by the Statute Laws, and continues at page 628:

> "Though the general consent of the most enlightened nations has, from the earliest historical period, recognized a natural right in children to inherit the property of their parents, we know of no legal principle to prevent the legislature from taking away or limiting the right of testamentary disposition or imposing such conditions upon its exercise as it may deem conducive to public good."
>
> "In this view the so-called inheritance tax of the State of New York is in reality a limitation upon the power of a testator to bequeath his property to whom he pleases, a declaration that in the exercise of that power he shall contribute a certain percentage to the public use; in other words, that the right to dispose of his property by will shall remain but subject to a condition that the state

has a right to impose. Certainly if it be true that the right of testamentary disposition is purely statutory, the state has a right to require a contribution to the public treasury before the bequest shall take effect. Thus the tax is not upon the property in the ordinary sense of the term, but upon the right to dispose of it and it is not until it has yielded its contribution to the state that it becomes the property of the legatee. * * * This, therefore, is not a tax upon the property itself, but is merely accorded in permitting property so situated to be transferred by will or by descent or by distribution."

After quoting extracts from the opinions of many state cases establishing the same propositions, Judge Brown says, after referring to Strode *v.* Commonwealth, 52 Pa. St., 181, at page 629:

"In this last case, as well as in Wallace *v.* Meyers, 38 Fed. Rep., 184, it was held that, although the property of the decedent included United States bonds, the tax might be assessed upon the basis of their value, because the tax was not imposed upon the bonds themselves, but upon the *estate* of the decedent, or the privilege of acquiring property by inheritance. Eyre *v.* Jacob, 14 Grattan, 422; Dos Passos on Inheritance Tax Law, chap. 2, sec. 8, and cases cited. Such a tax was also held by this court to be free from any constitutional objection in Mager *v.* Grima, 8 How., 490, 493, Mr. Chief Justice Taney remarking that 'the law in question is nothing more than an exercise of the power which every state and sovereignty possesses, of regulating the manner and terms within which property, real and personal, within its dominion may be transferred by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it. * * * If a State may deny the privilege altogether, it follows that when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy.' To the same effect is United States *v.* Fox, 94 U. S., 315.

"We think that it follows from this that the act in question is not open to the objection that it is an attempt to tax the property of the United States."

In *Magoun* v. *Illinois Trust and Savings Bank, supra,* the Supreme Court, in the discussion of a similar question as to the meaning and operation of the Illinois inheritance law, said, speaking by Mr. Justice McKenna, after stating the history of such laws in various States and countries, at p. 288:

> "The constitutionality of the taxes have been declared and the principles upon which they are based explained in United States *v.* Perkins, 163 U. S., 625, 628; Strode *v.* Commonwealth, 52 Penn. St., 181; Eyre *v.* Jacob, 14 Grat., 422; Schoolfield *v.* Lynchburg, 78 Virginia, 366; State *v.* Dalrymple, 70 Maryland, 294; Clapp *v.* Mason, 94 U. S., 589; *in re* Merriam's Estate, 141 N. Y., 479; State *v.* Hamlin, 86 Maine, 495; State *v.* Alston, 94 Tennessee, 674; *in re* Wilmerding, 117 California, 281; Dos Passos Collateral Inheritance Tax, 20; Minot *v.* Winthrop, 162 Mass., 113; Gelsthrope *v.* Furnell (Montana), 51 Pac. Rep., 267. See also Scholey *v.* Rew, 23 Wall., 331.
>
> "It is not necessary to review these cases or state at length the reasoning by which they are supported. They are based on two principles: 1. *An inheritance tax is not one on property, but one on successions.* 2. The right to take property by devise or descent is the creature of the law, and not a natural right—a privilege—and, therefore, the authority which confers it may impose conditions upon it.
>
> "From these principles it is deduced that the states may tax the privilege, discriminate between relatives and between these and strangers, and grant exemptions; and are not precluded from this power by the provisions of the respective state constitutions requiring uniformity and equality of taxation."
>
> "The second principle was given prominence in the arguments at bar. The appellee claimed that the power of the State could be exerted to the extent of making the State the heir to everybody, and the appellant asserted a natural right of children to inherit. Of the former proposition we are not required to express an opinion. Nor indeed of the latter for appellant conceded that the testamentary disposition and inheritance were subject to regulation. However, as pertinent to the subject, decisions of this Court may be cited."

In United States *v.* Fox, 94 U. S., 320, a law of the State of New York confining devises to natural persons and corporations created under its laws was considered, and a devise of land to the United States was held void. The Court said:

"The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated. McCormick *v.* Sullivant, 10 Wheat., 202. Statutes of Wills, as is justly observed by the Court of Appeals, are enabling acts, and prior to the statute of 32 Henri VIII there was no general power at common law to devise lands. The power was opposed to the feudal policy of holding lands inalienable without the consent of the lord. The English Statute of Wills became a part of the law of New York upon the adoption of her constitution in 1777; and, with some modification in its language, remains so at this day. Every person must, therefore, devise his lands in that State within the limitations of the statute or he cannot devise them at all. His power is bounded by its conditions.

"In Mager *v.* Grima, 8 How., 490, 493, there was considered the validity of a law of Louisana imposing a tax of ten per cent. upon legacies, when the legatee was neither a citizen of the United States nor domiciled therein. Mr. Chief Justice Taney considered the legal question of easy solution, and disposed of it summarily. He said: 'This is a plain case, and when the facts are stated the questions of law may be disposed of in a few words.' After stating the case briefly, he further said: 'Now, the law in question is nothing more than an exercise of the power which every State and sovereignty possesses, of regulating the manner and term upon which property, real or personal, within its dominion may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall

not be capable of taking it. Every State or nation may unquestionably refuse to allow an alien to take either real or personal property situated within its limits, either as heir or legatee, and may, if it thinks proper, direct that property so descending or bequeathed shall belong to the State. In many of the States of this Union at this day real property devised to an alien is liable to escheat. And if a State may deny the privilege altogether, it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy. This has been done by Louisiana. The right to take has been given to the alien, subject to a deduction of ten per cent. for the use of the State.

"In some of the States laws have been passed at different times imposing a tax similar to the one now in question upon its own citizens as well as foreigners, and the constitutionality of these laws has never been questioned. And if a State may impose it upon its own citizens, it will hardly be contended that aliens are entitled to exemption; and that their property in our own country is not liable to the same burdens that may lawfully be imposed upon that of our own citizens.

"We can see no objection to such a tax, whether imposed on citizens and aliens alike, or upon the latter exclusively."

The learned Justice then quotes extensively what was said by Mr. Justice Brown in United States *v.* Perkins, including the following:

"That while the laws of all civilized States recognize in every citizen the absolute right to his own earnings and to the enjoyment of his own property, and to the increase thereof during his life, except so far as the State may require him to contribute his share for public expenses, the right to dispose of his property by will has always been considered purely a creature of statute, and within legislative control."

The Court then quotes from the case of Curry *v.* Spencer, 61 N. H., 624, as follows:

"Wills, therefore, testaments, the rights of inherit-

> ance and succession, are all of them creatures of the civil or municipal law, and accordingly are in all respects regulated by them."

These two cases show that the Supreme Court considered the right of inheritance and the right to take by will, not as a common right—a natural right—guaranteed by the Constitution, but as a privilege within the power of the state legislature to grant or withhold. As the Supreme Court has said, through Chief Justice Marshall, in many cases: "The sovereignty of the state extends to everything which exists by its own authority or is introduced by its permission." The power to determine upon what conditions property should be allowed to pass by will has never been granted by the States to the Federal Government, and is one of the powers retained by the State under the provisions of the United States Constitution. Being a privilege granted by the State, it follows that it cannot be retarded, burdened or controlled in any way by the general government, as it would be if it is held that the State cannot regulate the transmission by will of United States Bonds. The State can regulate the transmission of all kinds of property, and it has treated all kinds alike by the Act in question. The United States Bonds are not discriminated against, as one might think from appellant's brief, but, like all other property, their value serves to measure the impost.

Whether the State has the absolute right to escheat all of a person's property on his death, or whether a family has an inherent right to inherit, are not material. These propositions were argued most extensively in *Magoun* v. *Ill. Trust & Savings Bank*, 170 U. S., 283, and how the Court will decide the question when a State has attempted to exercise the power, is not material to the question before the Court, for it must be conceded that a State has the power to regulate testamentary dispositions of property, and that is all the State of New York has attempted to do. Such power of regulation has always been exercised by the States, and in every State and Country will be found Statutes regulating such testamentary dispositions, which have never been, and cannot be, challenged as beyond the constitutional powers of the State.

That the right of a person to take by inheritance or by will is a favor conferred by a State and is subject to its power of regulation, is conceded in the following additional cases.

Mager v. *Grima,* 8 How., 490.
Carpenter v. *Commonwealth,* 17 How., 456.
Scholey v. *Rew,* 23 Wall., 331.
United States v. *Fox,* 94 U. S., 315.
Cooley's Const. Limitations (5th Ed.), p. 440.
Norman v. *Heist,* 5 W. & S. 171.
2 Blackstone Com., 211.
Lavery v. *Eagan,* 143 Mass., 392.
Bretton v. *Fox,* 100 Mass., 234.
Gilles v. *Weller,* 10 Ohio, 464.
Sturgis v. *Ewing,* 18 Ill., 176.
Edwards v. *Pope,* 3 Scam. R., 465.

Having the power to regulate the testamentary disposition of property, the State of New York, in conferring the privilege of taking upon the legatee, has under all the authorities, the right to exact for the privilege thus conferred, the payment of a bonus or tax upon the value of the privilege thus conferred. This is in no sense a tax upon the property, but is a bonus paid by the person allowed to take, for the privilege of taking.

The argument to which pages of appellant's brief is devoted that there is a common law right of testamentary disposition and of taking by will, and that it is protected by the 14th Amendment to the Constitution is not before the Court, for nowhere in the record is there a suggestion that the Act in dispute violates that amendment, and it cannot be raised in this Court for the first time. If there was a common law right as claimed, appellants admit it is subject to repeal or regulation and the courts of New York have decided that the act in question is nothing but a limitation of this testamentary power of disposition, and as this decision involves only a consideration of the statutes and Constitution of New York, it would seem to be final in this Court. Even the extracts in appellants' brief show that there was no inherent or natural right of testamentary disposition, because they show that at the adoption of our First Constitution the power to dispose by will existed not by virtue

of the unwritten law but by the early statutes of England which granted that right, and all countries had always regulated it. The common law right rested therefore not upon any natural right in the individual but upon these early statutes granting and regulating the privileges. The present statute simply regulates and limits the privilege as decided by the courts of New York and whether in any way this violates the 14th Amendment is not before the Court.

II.

THE TAX NOT BEING UPON THE UNITED STATES BONDS, BUT UPON THE PRIVILEGE OF SUCCESSION GRANTED BY THE STATE, NEITHER THE PROVISION OF THE FUNDING ACT OF 1870 NOR OF THE BONDS THAT "THE PRINCIPAL AND INTEREST ARE EXEMPT FROM TAXATION IN ANY FORM BY OR UNDER STATE, MUNICIPAL OR LOCAL AUTHORITY," HAVE BEEN VIOLATED. THE BONDS ARE NOT TAXED AT ALL; THE PRIVILEGE TO SUCCEED TO THEM IS TAXED, AND THE VALUE OF THAT PRIVILEGE IS ASCERTAINED BY APPRAISING THE BONDS, JUST AS THE UNITED STATES BONDS ARE INCLUDED AND A TAX PAID UPON THEIR VALUE IN DETERMINING THE VALUE OF A FRANCHISE.

(*a.*) The value of United States Government Bonds can be included in determining the value of the privilege of succession in order to fix the tax upon that succession, under the provisions of the Taxable Transfer Act, since the amendment of that act by Chapter 88 of the Laws of 1898, because there is no tax upon the Bonds.

Chapter 88 of the Laws of 1898 took effect March 21, 1898, and as Mr. Plummer died October 24, 1898, this question must be decided under the provisions of this amendment. Before the Amendment of 1898 the word *property* as used in the Transfer

Act of 1892 was defined "as property over which this State has any jurisdiction for the purpose of taxation." This definition first appeared in the act in 1892. In the *Matter of Whiting* (150 N. Y., 27), and the *Matter of Sherman* (153 N. Y., 1), the Court of Appeals had held that, although the value of Government Bonds could be properly appraised in determining the value of a succession, the words above quoted expressly exempted such bonds from valuation. Thereupon, to meet the objection raised in those cases the Legislature, by Chapter 88 of the Laws of 1898, amended the definition of the word *property by omitting the words above quoted,* and thus restored the law to its condition prior to 1892, and makes applicable to the decision of this case the entire line of reasoning adopted by Judge Andrews in the *Matter of Sherman,* 153 New York, 1, at pages 3, 4 and 5, where he held that with the Act in the form it was prior to 1892, the United States Bonds could be properly valued in fixing the tax.

(*b.*) Every case that can be found, where this question is raised, has decided that United States Bonds can be appraised to determine the value of the privilege of succession, in order to fix the tax or bonus to be paid the State for the privilege it confers.

Strode v. *Commonwealth,* 52 Pa. St., 181.
Clymer v. *Commonwealth,* 52 Pa. St., 185.
Wallace v. *Meyers,* 38 Fed. Rep., 184.
Matter of Sherman, 153 N. Y., 1.
Matter of Whiting, 150 N. Y., at p. 31.
Matter of Whiting, 2 App. Div. (N. Y.), 590.
Estate of Carver, 4 Misc. (N. Y.), 592.
Matter of Howard, 5 Dem. (N. Y.), 483.
Re Tugg's Estate, 15 N. Y. Supp., 548.
United States v. *Perkins,* 163 U. S., at p. 629.
See opinions in Appendix to Brief.

The theory upon which these cases were decided is the same as that upon which Transfer Laws have always been sustained, as shown in the previous point, viz., that the right of testamentary disposition of all kinds of property within a state, is

subject to the State's control; that as the State confers and regulates the privilege it has the power to say upon what terms it will allow any and all kinds of property within its borders to pass by will, and the terms upon which it will allow a legatee to take; that the tax or bonus thus imposed is upon the value of the privilege of succession thus created and regulated by the State, and not on the property. As this Court says in *Magoun* v. *Ill. Trust & Savings Bank* (*supra*); "The tax is not on money; *it is on the right to inherit;* and hence a condition of inheritance, and it may be graded according to the *value of that inheritance.*"

Appellant admits the power of the State to regulate testamentary dispositions, and the regulations in this case is plainly within the power of the State to impose.

Upon the theories above expressed, United States Bonds have universally been valued in ascertaining the value of succession under Transfer Laws like the one in question. It has been expressly so held in the following cases:

Matter of Sherman, 153 N. Y., 1,

See opinion of Judge Andrews concurred in by the entire Court at pp. 3 to 5 for a full statement of the reasons why this right exists.

Strode v. *Commonwealth,* 52 Pa. St., 183;
Wallace v. *Meyers,* 38 Fed. Rep., 184,

where there are able opinions on the subject.

These cases are quoted with approval that the value of Government Bonds can be included in fixing the tax in *United States* v. *Perkins,* 163 U. S., at p. 629, the Court saying:

> " It was held that, although the property of the decedent included United States bonds, the tax might be assessed upon the basis of their value, because the tax was not imposed upon the bonds themselves, but upon the *estate* of the decedent or the privilege of acquiring property by inheritance."
>
> *Estate of Carver,* 4 Misc. (N. Y.), 592 (Opinion by Surrogate Davie) affirmed on this opinion, 75 Hun, 612.

Matter of Howard, 5 Dem. (N. Y.), 483, where there is an able opinion by Surrogate Rollins.

Re Tuigg's Estate, 15 N. Y. Supp., 548, opinion by Surrogate Ransom.

Moreover, in the *Matter of Whiting,* 2 App. Div., 590, a majority of the New York Supreme Court (1st Dept.) held that the value of Government Bonds could be included, even under the Act of 1892 before it was amended. This decision was modified by the Court of Appeals entirely upon the ground of the definition of the word "property," which was defined in the Act as "*property over which this State has any jurisdiction for the purpose of taxation.*" In his opinion Judge Vann states, as the opinion of the majority of the Court, 150 N. Y., at p. 31: "That although the State may have the power to impose a succession tax upon United States Bonds, it has not yet done so; that the phrase 'property * * * over which the State has any jurisdiction for the purpose of taxation' refers to the jurisdiction actually exercised through contemporary statutes, rather than to the entire jurisdiction actually possessed by the State."

In the *Matter of Sherman,* 153 N. Y., 1, the Court of Appeals after *holding that United States Bonds could properly be valued to ascertain the amount of a transfer tax,* held that they were properly excluded under the Act of 1892, owing to the *definition of "property"* as above quoted by the Court, saying: "But we are of opinion that United States Bonds were properly excluded from the valuation of the decedent's estate by the Surrogate by force of §22 of the Act of 1892."

These cases are now authorities in favor of including the value of the bonds, because by Chapter 88 of the Laws of 1898 the words in the definition of property "over which this State has any jurisdiction for the purpose of taxation" are omitted, and the law is thus restored to the condition it was in prior to 1892. The object of this amendment was to take out of the law the words which the Court had held expressly exempted United States Bonds, and to restore the Act to the condition in which it was, when Judge Andrews said in *Matter of Sherman,* 153 N. Y., at page 5:

"There was no limitation of this language in the sub-

sequent sections of the act and it *was held, as we think properly, that United States bonds were to be valued in fixing the tax.*"

The words "in any form," used in the exemption of the bonds from State taxation were used because, as appellant states in his brief, the form used as to Federal taxation could not be used as the States vary so in their methods of imposing taxes on property. They were used to cover all kinds of direct taxes of the bonds, but not to exempt from taxes imposed upon privileges, where the bonds are not taxed but appraised. If they were used for this latter purpose, then necessarily the decisions of this Court in the Franchise Cases and Bank Stock Cases must be wrong. Certainly it cannot be assumed that they were used to exempt the bonds from the provisions of the Laws of State regulating the testamentary power of disposition, as that is a matter not subject to the Federal control.

The great research of plaintiff's counsel has not been able to find a single case where Government bonds have not been appraised in fixing the tax upon the value of the privilege of succession, and for the Court to now hold that Inheritance Law imposes a tax upon the bonds themselves, as claimed in the assignments of errors, requires the Court to overrule the theory upon which not only this Court, but every other Court, has sustained the validity of Inheritance Laws. If this act imposes a tax on the bonds, then *United States* v. *Perkins,* 163 U. S., 625, was improperly decided. The question in that case, as stated by Judge Brown, was " whether it is within the power of the State to tax bequests to the United States." If the tax was upon property, then the bequest could not be taxed, for it is elementary that no State has the power to tax the property of the United States any more than it has the power to tax United States Bonds, but the Court held that the tax could be imposed, because the property of the United States was not taxed, but only the privilege granted by the State to the United States of succession to it. Therefore, this case is a direct authority that no tax is imposed on the bonds in the present proceedings, any more than it was on the property involved in that case. In both cases the State has granted a

privilege of succeeding to the property on condition that a tax or bonus on the value of the privilege granted be paid to it, and in no sense is this a tax on the property itself, which, under all the authorities, is simply appraised and not taxed.

The bonds not being taxed, the assignment of errors that the Funding Act of 1870 and the obligations of the contract of exemption contained in the bonds have been violated, and that the power of the United States to borrow money has been impaired (Record, pp. 21 and 22, Assignment of Errors Second, Third and Fourth) are not well taken. Each of these assignments alleges that the violation consists "in imposing a tax upon said bonds." No tax has been imposed on the bonds.

The first assignment of error is general and points out no provisions of the United States Constitution or of a Federal statute which is claimed to be violated and raises no Federal question.

III.

IN ASSESSING TAXES UPON THE VALUE OF FRANCHISES OR PRIVILEGES GRANTED BY THE STATE, OR UPON THE VALUE OF STOCK OF INDIVIDUALS, IT IS IMMATERIAL WHETHER THE PROPERTY WHICH GIVES VALUE TO THESE PRIVILEGES, FRANCHISES, OR THE STOCK ARE NON-TAXABLE. THE VALUE OF UNITED STATES BONDS IS ALWAYS INCLUDED AND IT IS NOT CLAIMED THAT BY SO DOING THERE IS ANY INTERFERENCE WITH THE BORROWING POWER OF CONGRESS.

(*a.*) Thus, the amount of capital of a foreign corporation, invested in imported articles in their original packages, can be included in assessing the tax upon a foreign corporation doing business in the State of New York, where the tax is based upon the amount of capital stock employed in this State, although the Supreme Court has repeatedly held that no State

can impose a tax, directly or indirectly, upon imported articles in their original packages.

United States v. *Roberts,* 171 U. S., 658, affirming 149 N. Y., 608, and 91 Hun, 158.

In answering the suggestion that by including the value of the capital invested in these imported articles, the Constitution of the United States and the power of Congress to impose taxes on imports and regulate commerce had been evaded, Mr. Justice Shiras, writing the opinion of the Court, says at page 64:

> "Again, it is said that, even assuming that the importation of crude drugs and their sale in the original packages constituted a portion of the corporate business, no tax could be imposed by the State under the doctrine of Brown v. Maryland, 12 Wheat., 419.
>
> "But that case is inapplicable. Here no tax is sought to be imposed directly on imported articles or on their sale. This is a tax imposed on the business of a corporation, consisting in the storage and distribution of various kinds of goods, some products of their own manufacture and some imported articles. *From the very nature of the tax, being laid as a tax upon the franchise of doing business as a corporation, it cannot be affected in any way by the character of the property in which its capital stock is invested.*
>
> Society for Savings *v.* Coite, 6 Wall., 594.
> Provident Institution *v.* Massachusetts, 6 Wall., 611.
> Pembina Mining Co. *v.* Pennsylvania, 125 U. S., 181.
> Home Insurance Co. *v.* New York, 134 U. S., 594."

(*b.*) The privilege of succession granted by the State is more like the grant of a franchise to a corporation than anything else. In both cases the State grants a privilege—in one case to succeed to property, and in the other to be a corporation. Both privileges are valuable personal property.

The plaintiff attempts to distinguish a large number of cases where United States Bonds have been appraised in de-

termining the value of franchises or privileges conferred by the State, but the principle is exactly the same in those cases as underlies the decision in this. In both cases the State grants or regulates the privilege—in the one, it grants or regulates the privilege of succession to property, in the other it grants or regulates the terms upon which a corporation can do business, and in both cases imposes a tax based upon the value of privilege thus granted.

The Supreme Court of the United States has repeatedly upheld taxes imposed on the value of the franchises of corporations, or upon the value of privileges granted, when it has been necessary to include the value of United States Bonds in determining the amount of the tax. In answer to the objection that it was a tax upon Government Bonds, it has been held that the tax is not upon the bonds, but upon the privileges or franchises, and the bonds are only valued in order to determine the amount of the tax.

The principle of these cases cannot be distinguished from that of the case at bar.

Monroe Savings Bank v. *City of Rochester,* 37 N. Y., 365, cited with approval 134 U. S., at p. 401.
People v. *Home Ins. Co.,* 92 N. Y., 328; affirmed 134 U. S., 598.
Society v. *Code,* 6 Wall., 594.
Institution v. *Massachusetts,* 6 Wall., 631.

In *The Home Insurance Co.* v. *New York* (*supra*) the State of New York had imposed a tax on the corporate franchises at the rate of .000¼ on the capital stock for each one per cent. of the dividend declared during the past year. The capital stock of the Insurance Company was $3,000,000, of which $1,940,000 was invested in Government Bonds, and it was claimed that the interest on these bonds could not be included in determining the amount of the tax. This contention was overruled by this Court upon the ground that, *as the bonds were only appraised to determine the value of the franchise,* no tax was imposed upon the bonds themselves. In the course of his opinion Mr. Justice Field says at page 599:

"Reference is only made to its capital stock and dividends for the purpose of determining the amount of the tax to be exacted each year.

* * * * * * * *

"The granting of such right or privilege rests entirely in the discretion of the State, and, of course, when granted, may be accompanied with such conditions as its legislature may judge most befitting to its interests and policy. It may require as a condition of the grant of the franchise, and also of its continued exercise, that the corporation pay a specific sum to the State each year, or month, or a specific portion of its gross receipts, or of the profits of its business, or a sum to be ascertained in any convenient mode which it may prescribe. The validity of the tax can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privilege it bestows.

* * * * * * * *

From the very nature of the tax, being laid upon a franchise given by the State, and revocable at pleasure, *it cannot be affected in any way by the character of the property in which its capital stock is invested.* The power of the State over the corporate franchise and the conditions upon which it shall be exercised, is as ample and plenary in the one case as in the other."

* * * * * * * *

The Court then cites with approval the case of Monroe Savings Bank *v.* City of Rochester, 37 N. Y., 365, where the Court of Appeals of New York State had laid down this same doctrine, and continues at page 602:

"The doctrine of the taxability of the franchise of a corporation without reference to the character of the property in which its capital stock or deposits are invested is sustained by the judgment in Society for Savings *v.* Coit, 6 Wallace, 594, and Provident Institution v. Massachusetts, 6 Wall., 611."

It is not deemed necessary to make extracts from the cases there cited by Justice Field because they are familiar to this Court. In both cases taxes were imposed upon the franchise of corporations, and, in determining the amount of the tax, it was claimed that it was unconstitutional to appraise that portion of its capital which was invested in United States Government Bonds. This contention was overruled, the Court holding squarely the tax was not imposed upon the bonds but upon the franchise, and that the bonds were simply appraised to determine the value of this franchise or privilege.

Under all of these cases it was conceded, as it is here, that a direct tax cannot be imposed upon Government Bonds, and if such was the result of the acts in question, they were unconstitutional. The only inquiry before the Court was whether the tax was really upon the franchise or upon the bonds, and when the Court reached the conclusion that the tax was imposed upon the franchise, they held squarely the tax was not upon the bonds and there was no constitional objection to appraising them in determining its value. That is all that has been done in the case at bar. The tax is upon the privilege conferred by the State upon Miss Plummer of inheriting these bonds, and they are simply appraised to determine the value of this inheritance. The principle underlying this franchise tax cannot be distinguished from the case at bar.

(*c.*) The same distinction is illustrated by the cases in the United States Supreme Court, upholding a tax upon the value of bank shares. Although the Court had held that the bank could not be taxed upon its capital, when it was invested in Government Bonds, nevertheless it held that a tax could be imposed upon the value of the shares of stock held by individuals in the bank, although all of the capital in the bank, which made up the value of the shares, was invested in Government Bonds, the reason being that the tax was not upon the bonds, and that the bonds were only used in determining the value of the shares.

Van Allen v. *Assessor*, 3 Wallace, 573.
People v. *Commissioner*, 4 Wallace, 244.

IV.

THE CLAIM THAT IT IS IMMATERIAL WHETHER THE ACT IMPOSES A TAX UPON THE BONDS OR UPON THE VALUE OF THE SUCCESSION, BECAUSE IN EITHER CASE IT MIGHT RESULT IN THE GOVERNMENT GETTING A SMALLER PRICE FOR ITS BONDS, AND THUS AMOUNT TO A HINDRANCE OF THE BORROWING POWER OF CONGRESS IS UNTENABLE.

(*a.*) This claim amounts to an assertion that any act of a state legislature, which might in any way affect the price at which the Government might sell its securities, is therefore unconstitutional, because the borrowing power of Congress is thus impeded; or to put the proposition in another way, if the Court might think if the act complained of was repealed, the Government might obtain a higher price for its bonds, then the act must be declared unconstitutional. This claim leads to the most absurd results, and would render unconstitutional, so far as they affected Government Bonds, the execution laws of all States, the provisions in the various States for the sale of decedent's property for the payment of his debts, and almost every law which has been passed by the State regulating the time within which bequests to charitable corporations must be made, and the amount which a decedent, leaving certain relatives, can leave to charitable corporations.

(*b.*) No such test as the uncertain one here suggested, viz., what the Court might think would be the effect of legislation upon the price of Government Bonds, has ever been announced by any Court as the criterion to determine whether the borrowing power of Congress has been affected by State legislation. The test announced in all the cases has always been one turning upon the question of law, whether the effect of the Act complained of was to impose a tax upon the bonds themselves. If the tax is upon the bonds, the Act is unconstitutional; if, on the other hand, the bonds are simply appraised to determine the value of what is taxed, then the Act is not unconstitutional. This test is reasonable and presents a simple question of law,

depending upon the construction of the Act complained of, and not upon inference or surmises as to what may happen in the future. How an act might affect the prices of bonds is uncertain, and whether it would affect it at all very remote. Such a test would make the constitutionality of a law depend, not upon a question of law, but upon the guess of the Court as to what it might think would be the effect of such legislation in the future. It is asserted here by appellants that a decision by this Court that Government Bonds could be appraised in determining the amount of this tax would affect the price, but we venture to predict that a decision of this Court that these bonds can be appraised in fixing this tax will not affect their price in the slightest.

Inheritance laws have existed in this country in some States for over sixty years. The case of *Strode* v. *The Commonwealth of Penn.*, 52 Pa. St., 181, which first held Government Bonds subject to the provisions of the inheritance law, was decided in 1866, and *Wallace* v. *Myers*, 38 Fed. Rep., 184, was decided in 1889. So it has been publicly known from those early periods in the history of transfer laws that Government Bonds were subject to transfer laws. Since that time they have always been included. But nevertheless the rate at which the Government has been able to borrow money has steadily decreased, and the price at which it sold its bonds, as well as the price at which the bonds sell in the general market, have increased since these periods. This is due largely to the increase of wealth and the stability of the investment in the eyes of the public.

The bonds now before the Court were issued under the Funding Act of 1870, and it was well known at that time that the exemption from State taxation in any form did not exempt them from the provisions of the inheritance law, because Strode *v.* Commonwealth had been decided long prior to that time, and therefore the purchasers must have understood that this exemption did not cover inheritance taxes, and therefore there can be no violation of the terms of that contract. It was also well known at the time the Government sold its 2% bonds in 1898 that such bonds would be subject to the State inheritance laws, but nevertheless there was an enormous demand for

said bonds, which shows that the fact that such bonds might be appraised in determining the value of the inheritance did not affect in the slightest the borrowing power of the Government. As previously stated, the increase of wealth in the country and the stability of the investment are the largest factors in determining the price of the bonds, and it is confidently asserted that a decision in this case that they are subject to the inheritance tax laws will not affect the price a fraction of a cent. This is further evidenced by the fact that when this case was decided by the Surrogate, it was publicly announced in all of the newspapers in the City of New York that Government Bonds were subject to the transfer tax laws, but nevertheless it had no effect upon the price at which such bonds were selling in the market. The possibility is too remote to be considered. It is like the attempts which have been made to have it decided that the property of corporations engaged in an intestate commerce or the property of a bridge company over which interstate commerce runs, cannot be taxed by the State as property, because the effect would be to raise the rates which the bridge company or the railroad company would charge for the transportation of property, and thus indirectly amount to a tax on interstate commerce. The Court has held that such a possibility is too remote to be considered.

Henderson Bridge Co. v. *Kentucky*, 166 U. S., 150.
Adams Express Co. v. *Ohio*, 165 U. S., 194.

(*c*.) The same statement that the price of bonds would be reduced and thus the borrowing power of the United States would be affected could with equal and even greater justice be made in the Franchise Tax cases and Bank Share cases previously cited and the argument was in fact made in these cases, because the banks or corporations would not pay as much for the bonds, if they knew their value could be included in determining the value of the franchise or of the stock, or would pay more if they knew they could not be. Nevertheless these cases were all decided upon the legal question whether the act taxed the bonds or whether they were simply appraised to determine the value of the franchise or stock. The price of bonds would be affected by these decisions much more than by any decision in this case.

It is well known that the largest holders of these bonds are the banks, many of which are compelled by law to invest their reserve in such securities, and also the large money corporations, like the Home Insurance Co. and other similar corporations, existing in all of the large cities, which pay franchise taxes. All of these enormous corporations with their immense investments of bonds were affected by these decisions. The amount of bonds which are valued *every year* in fixing the value of the shares of stock in these banks and the franchise tax paid by those corporations is enormous and exceeds greatly the bonds which may be held subject to valuation under Transfer Tax Laws, which exist in a few States and affects only a few people, and a few bonds in comparison. If any acts were to be held unconstitutional because the price of bonds might be reduced or the field of borrowers limited and thus the borrowing power of Congress be affected, surely these acts should have been. Nevertheless, this Court held there was no constitutional objection to valuing the bonds for the purposes of these taxes, and if there was none in these cases certainly there can be none in this case. The facts that after these decisions, which affected *an annual tax*, these large moneyed corporations continue to hold enormous amounts of bonds and to be the largest bidders at all bond sales and that the Government has been able to successfully sell large amounts of bonds at a lower rate of interest than before, show how remote and contingent is the possibility that any decision in this case, holding the bonds can be appraised in the few States having inheritance laws in fixing the tax on successions, will affect in the slightest degree the borrowing power of Congress. The fear suggested that if the power is granted, the rate may be made so excessive as to amount to a burden is too shadowy to require argument, and the possibility is certainly no greater than it was in the Franchise and Bank Share Stock cases.

The supposed case that the Government might be able to sell 2% bonds if the Government could declare an exemption from Transfer Laws seems to rest upon the idea that the United States can override the State laws of descent so as to create a special privilege. This it cannot do. It cannot deal with a subject

reserved to the States such as the regulation of testamentary dispositions of property. Of course if the Government should agree to pay any Transfer Taxes in the States having Transfer Laws the bonds would sell for a higher price in those particular States, but it does not follow from this that the imposition of such taxes have diminished the value of United States bonds in such States since such law applies equally to all kinds of property. It would be just as logical to argue as to the possible effect, if the United States should offer to holders of bonds in States not having Transfer Laws a bonus every time a death occurred. Of course the price would be higher.

The same supposed case could be put with greater force of all the corporations whose bonds are included in fixing their franchise taxes saying we will take the 2% bonds if you will either pay these annual taxes or exempt us from them. Of course then the bonds would bring a higher price, but it that any reason for holding these Franchise taxes unconstitutional or that the Federal Government could grant the exemption.

The appellant puts the supposed case that if the Government should issue proposed new 2% bonds, and they were held subject to State and Federal Inheritance Laws, and the purchaser lived only a few years, he must be out of pocket on his investment. How could this purchaser do any better if he had invested in other securities under the same circumstances? The result would be the same, because the acts affect all property and therefore he could not do better elsewhere.

(*d.*) The claim advanced by appellants leads to most absurd results.

Any State law which may affect the price of bonds is unconstitutional because hindering the borrowing power, is the claim of appellants. Are all the execution laws of all the States unconstitutional so far as they affect United States bonds? It cannot be doubted that people would pay a higher price for United States bonds, if they knew they could not be taken and sold in payment for their debts, and the bonds would become the most desirable form of investments imaginable with this exemption. The logical result of plaintiff's argument that any act, which prevents the Government from getting a higher price

for their bonds, is unconstitutional, would necessarily render all such execution laws unconstitutional so far as they may affect United States bonds because if they did not the bonds would bring a higher price. For the same reasons the provisions of the laws of the various States providing a method for the sale of a decedent's property for the payment of his debts cannot apply to United States bonds, because if they did not, the Government could get a higher price. Therefore, the law is unconstitutional according to appellant's new test. By the law of New York a person leaving certain relatives cannot give more than one-half of his property to charitable corporations and by another can give nothing to such institutions unless the will is made at least two months before his death. Have these laws no application to the portion of the estate invested in United States bonds, because people woud give more for bonds if in that way these statutes could be evaded? They cannot have, if appellant's contention is correct that any act, which may affect the price of the bonds, is unconsitutional.

Any rule which would lead to such absurd results must be wrong.

All the States regulate the investments of corporations created by it as to the amount and character of the securities it may hold, and are regulations as to amount of United States bonds that such corporations can hold interferences with the borrowing power of Congress?

In Monroe Savings Bank *v.* City of Rochester, 34 N. Y., 365, the franchise granted to a Savings Bank was declared personal property and liable to taxation at an amount not exceeding the gross sum of their surplus earned, and the property of the bank was made liable to sale for the taxes. The bank held a large amount of United States bonds. After stating that property invested in United States bonds could not be taxed, the Court says at page 369:

> "It is true, that where a tax is laid upon the property of an individual or a corporation, so much of their property as is vested in United States bonds is to be treated, for the purposes of assessment, as if it did not exist, but this rule can have no application to an assessment upon

a franchise, where a reference to property is made only to ascertain the value of the thing assessed.

"It is, however, argued with great ingenuity and skill that, inasmuch as the plaintiffs, among other powers given them, have the right to invest their money in United States bonds, their franchises and privileges cannot be taxed by the State. The power thus to invest their moneys, it is contended, is a franchise for lending to the United States, and therefore cannot be taxed, because such taxation would trench on the power of the United States to borrow. This is stretching the argument too far. It cannot be pretended that the State would violate any obligation resulting from the power of the United States to borrow money, if the law conferring the power upon the plaintiffs to invest their moneys in United States stocks and bonds were repealed. The State is under no obligation, express or implied, to legislate to enhance the credit of the general government, and should it adopt a system of legislation which indirectly produces such a result, its power of repeal cannot be doubted. The position, that a franchise granted by the bounty of the State is not taxable, because coupled with that franchise is the privilege of loaning money to the general government, is not more untenable than to argue, that, because such a franchise enhances the credit of the United States, therefore the legislature could not repeal the law granting the franchise without violating its constitutional obligations. Suppose the legislature had limited the amount in which the plaintiffs could invest its moneys in the securities of the United States, it will not be contended that such limitation would be void because it impaired the power of the United States to borrow money.

"It must, therefore, be regarded as sound doctrine to hold that the State, in granting a franchise to a corporation may limit the powers to be exercised under it, and annex conditions to its enjoyment, and make it contribute to the revenues of the State. If the grantee accepts the boon it must bear the burden."

(*c.*) Neither is there any force in appellant's position that even if the tax is upon the succession the ability of the Govern-

ment to borrow money at a high premium has been, or may be, affected by the fact that they are subject to a succession tax. Under the authorities previously cited the State has the right to prevent the disposition by will and take all of decedent's property. To take all would not be unconstitutional, and therefore to take part cannot be. But whether the state has the right to take all, which is a position extensively disputed in the appellant's brief, they, nevertheless, concede that the state has the power to regulate testamentary disposition, and the effect of the law in question is a reasonable regulation of that conceded power of regulation, by exacting the payment of a reasonable bonus to itself. The argument of the appellant ignores the fact that a person when he buys the bonds knows that he has a right to enjoy them free from taxation during his life, but has no such inherent right to dispose of them by will, but as Judge Brown says in *United States* v. *Perkins*, 163 U. S., at page

> "Testamentary disposition is purely statutory. * * * * The State has the right to require contribution to the public treasury before the bequest shall take effect. Thus the tax is not upon the property in the ordinary sense of the term but upon the right to dispose of it, and it is not until it has yielded its contribution to the State that it has become the property of the legatee."

It is claimed that because the bonds run to the assigns of the original holder that this would include assignees, who take by virtue of a testamentary disposition, and that therefore the bonds confer the right of testamentary disposition. This does not follow at all. The United States Government does not attempt to declare how a person should become the Assignee of the bond, and it cannot be presumed that they intended, by the use of this word to legislate upon a subject, which was not within its power, and which is a power reserved to the State by the Federal Constitiution, to wit, that of regulating testamentary disposition of all property within its borders. The effect of this clause in the bond is simply that the United States Government agrees to pay the principal and interest on the bond to whomsoever may be the legal owner of the same.

Ownership includes the power of disposition, but this is power of disposition during life. It has never been held as a matter of natural right, that because a man owned a thing, he could dispose of it after his death without regard to the regulations which a State may make as to the testamentary disposition of property. The power to dispose of property by will is not an incident to the ownership of property, except in accordance with such reasonable conditions as the State has a right to impose. The Government agrees to pay the Bond to the Assignee. Conceding that this includes a testamentary assignee, the Government has not attempted to say who is such a testamentary assignee, nor how nor under what restrictions he may become such. That is left to the laws of the State. No one is a testamentary assignee, except one who takes under and in accordance with the conditions and regulations which the State imposes upon the testamentary power of disposition. Suppose the bonds have passed from the testator to his legatee. The owner when he bought the bonds could not acquire from the Federal Government the right to thus transfer them. The State conferred the right, or, under appellant's admission, has regulated it. It granted or regulated the privilege and has the power in granting or regulating it to impose reasonable regulations upon its exercise. Suppose the will was for some informality invalid under the State law, would the Government officials ignore the formalities of the New York Law and pay the bonds to the person named in the will, because the testator intended to assign the bond to this person. Miss Plummer could not become the assignee of the Bond except by a will valid under New York law and in accordance with the other regulations respecting testamentary dispositions made by that State. The exaction of a bonus to itself is a reasonable regulation, and when that bonus is paid and the will is in accordance with the Laws of New York, Miss Plummer becomes the Assignee of the Bond and not before, and then she has a legal right to demand its payment and the Federal Government has agreed to pay it to her as the legal owner. The contract in the Bond has not been violated because under no circumstances does the Federal Government pay more or less than the principal of the bond.

(*f.*) It is impossible in the limited time allowed to go over and reply in detail to the voluminous brief of the appellant in this case. The mere setting out of the terms of the Funding Act of 1870 and of the bonds themselves that they are free from State taxation in any form adds nothing to the broad statement, conceded by the Court in all the cases where the question has been before it, that a direct tax cannot be imposed upon United States Bonds either directly or by subterfuge. Much of the brief is directed to establish the proposition that United States Bonds are not taxable, which is fully conceded by the defendant. The difficulty with the appellant's contention is that much of his brief is not applicable, because the bonds are not taxed, but only the privilege of succession to them. A right which not only this Court, but the Courts of every State before whom the question has ever come, have conceded the State has the power to regulate, if not by taking away entirely, certainly by allowing to a limited extent, as they have done by the act in question.

The question before the Court is simply whether Government Bonds can be appraised in determining the value of an inheritance under a will of a resident of the State of New York, and whether under such circumstances the tax is imposed upon the bonds or not. Whether under the law of New York if the bonds belong to a non-resident, or if a resident had attempted to dispose of them during life to take effect on death, it would be necessary for the Court to hold in these cases it was a tax upon the bonds themselves, and not upon the privilege of succession, have no application or bearing upon the question now before the Court. These bonds do not pass from a non-resident but pass under the will of a resident, and in neither of the two ways suggested, and what the Court might decide in these two cases is immaterial and must be left for a decision when these cases arise.

Any decision which the Court may make regarding the right to exclude the value of Government Bonds under the provisions of the Federal Inheritance Law, and whether that law imposes a tax directly or indirectly on the bonds themselves, which would therefore be unconstitutional, and whether the terms of the bonds exempt them from Federal taxation, can have no bearing upon the decision in this case. It may be possible that the

excise imposed by the Federal Inheritance Law may be construed to be a tax upon the bonds, or "taxes or duties of the United States" within the exemption in the bonds thus created from Federal taxation, without in the slightest affecting the decision of this case. Here the tax is not upon the bonds, but upon the privilege of succession to them, a right created by the State, and which, under all the authorities, and the concession of counsel for the appellant in this case, and the counsel for all the parties including the Solicitor-General in the Federal cases, the State has the power to regulate.

THE CLAIM ADVANCED BY THE APPELLANT GOES TOO FAR.

Granting to the fullest extent that Congress, in the exercise of the power to borrow money, has the right, as claimed by the appellant, to enact such conditions as will aid it in the exercise of that power, in order to provide a market for the bonds, the only condition that Congress has imposed to aid the Government in the exercise of its borrowing power, is that the bonds shall not be taxed. Congress has not attempted to regulate their transmission by will, a subject over which this Court and every other Court, where the question has ever been discussed, say Congress has no control, it being one that rests entirely with the States. The sole question is, therefore, does the Act now before the Court tax the bonds, and the authorities are uniform that it does not, but simply taxes the privilege of succession created and regulated by the State, the bonds being simply appraised to ascertain the value of the succession. This under all the authorities can legally be done by the State.

The appellant in his elaborate brief attacks the reasoning upon which every case, which has ever passed upon inheritance laws, has ever been decided. With the help of supposed cases which cannot arise under the Act in question, and which probably never will arise, they seek to have this Court hold that this Act, which regulates the transmission of the property by will in a manner conceded to be reasonable, is unconstitutional so far as it may apply to Government Bonds. The Act regulates the transmission of all property within the State. All property is treated alike. Government Bonds are placed on the same

footing as all other kinds of property, so far as the reasonable regulations of this law are concerned. This law, passed within the powers of the State, and which must be conceded to be a reasonable regulation of testamentary disposition, should not be set aside upon the bug-bear raised by the appellant, that some future legislature may pass an outrageous law as to the rate of taxation upon this subject, which, as it would necessarily affect all kinds of property, will probably never be passed. When such an outrageous law as the one outlined in the brief of the appellant has been passed and has come before the Court for adjudication, then will be the time to argue whether such a law can be sustained, but the imaginary possibility of such a case should not be allowed to defeat the application of this law, which is not open to the objection of being unreasonable or arbitrary.

(See remarks of appellant's counsels to same effect in their brief at foot of page 85 and page 86.)

Finally.

THE JUDGMENT AND DECREE BELOW SHOULD BE AFFIRMED AND THE CASE REMANDED WITH THE USUAL INSTRUCTIONS TO THE COURT BELOW.

JABISH HOLMES, JR.,
EDGAR J. LEVEY,
Of Counsel.

No. 1489

FEB 26 1900

JAMES H. MCKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1899.

HARRY FLEISCHMANN, as Executor of the Last Will and Testament of JOSEPH FLEISCHMANN, Deceased,

Plaintiff in Error,

vs.

BIRD S. COLER, Comptroller of the City of New York,

Defendant in Error.

In Error to the Surrogate's Court of the County of New York, in the State of New York.

Appendix to Brief for Defendant in Error, Containing Opinions that United States Bonds can be Appraised in Determining the Value of Successions.

JAMES HOLMES, Jr.,
EDGAR J. LEVEY,
Of Counsel.

LIBERATOR PUBLISHING CO., 49 BEEKMAN ST., N. Y.

EXTRACT FROM CASES WHERE UNITED STATES BONDS HAVE BEEN APPRAISED TO DETERMINE THE VALUE OF THE PRIVILEGE OF SUCCESSION.

Matter of Sherman, 153 N. Y., 1.

1. *Inheritance and Transfer Tax Laws. United States Bonds.—The inclusion of United States bonds in the valuation under laws for the taxation of the right of transfer of property by inheritance or by will, for the purpose of ascertaining the tax, is a valid exercise of legislative power by a State, and does not constitute a taxation of Federal securities.*

2. Transfer Tax Act of 1892. Exemption of United States Bonds.—United States bonds, owned by a resident decedent, which would otherwise be subject to valuation for the purpose of fixing the tax under the Transfer Tax Act of 1892 (Ch. 399), are exempt from such valuation, by force of the provision (§22) which limits the meaning of the words "estate" and "property," as used in that act, to property over which the State has jurisdiction for the purposes of taxation.

ANDREWS, Ch. J. This appeal is from an order which affirmed the decision of the Surrogate, which excluded from appraisal under the Act, chapter 399 of the Laws of 1892, in relation to the taxable transfers of property, United States bonds amounting to $10,000, owned by the testator, a resident of the State, who died in 1896. The question presented depends upon the provisions of the Act of 1892. The power of a State to tax the right of transfer of property by will or the right of succession under the intestate laws of the State is not an open question. It results from the acknowledged principle that the right to dispose of property by will and of succession thereto in cases of intestacy is derived from and under the municipal law. The State which confers the right and prescribes the rule of descent or distribution, may, therefore, annex to the privilege which it confers such reasonable conditions to its employment as it may deem expedient. There is no doubt that the laws for the taxing of inheritances or of the

right of transfer by will are within the general scope of legislative power. The special question here is whether the Act of 1892 exempts from valuation for the purpose of fixing the tax imposed by the Act that part of the estate of the testator represented by United States bonds. The form of the question above stated assumes that the bonds would be the proper subject of valuation unless excluded by the true construction of the act. If the tax imposed by the law of 1892 is a property tax in the ordinary sense, levied upon the property of a testator or an intestate, it could not be sustained as a lawful exercise by the State of the power of taxation, so far as it affected securities of the Federal government. The principle that a State cannot, in the exercise of the power of taxation, tax obligations of the United States, was established at an early day. But the tendency both of the Federal and State courts has been in the direction of limiting the operation of this immunity and to uphold State statutes imposing taxation, which, although operating indirectly upon property in government securities, were enacted for another purpose, and where the indirect taxation was merely an incident to the exercise by the State of an acknowledged power of government. Laws taxing franchises of corporations and providing for taxation, measured by the value of the corporate property, including Federal securities, or by income derived in part from investments therein, have been sustained, and illustrate the tendency to which we have referred. (Society for Savings *v.* Coite, 6 Wall., 594; Provident Institution *v.* Massachusetts, Id., 631; People *v.* Home Ins. Co., 92 N. Y., 328 Id., 119 U. S., 129).

This Court has not been called upon to consider the question of the power of the State to prescribe that in ascertaining the value of the property of a decedent for the purpose of fixing the tax, under the Collateral Inheritance or Transfer Tax Laws, the value of Federal securities owned by the decedent shall be included. But we apprehend that the existence of the power cannot be denied upon reason or authority. The tax imposed is not, in a proper sense, a tax upon the property passing by will, or under the Statutes of Descents or Distribu-

tions. It is a tax upon the right of transfer by will, or under the intestate law of the State. Whether these laws are regarded as a limitation on the right of a testator to dispose of property by will, or upon the right of devisees to take under a will, or the right of heirs or next of kin to succeed to the property of an intestate, is not material. The so-called tax is an exaction made by the State in the regulation of the right of devolution of property of decedents, which is created by law, and which the law may restrain or regulate. Whatever the form of the property, the right to succeed to it is created by law, and if the property consists of Government securities, the transferee derives his right to take them as he does his right to take any other property of the decedent, under the laws of the State, and the State by these statutes makes the right subject to the burden imposed. The question was answered by the Supreme Court of Pennsylvania in Strode *v.* Commonwealth (52 Pa. St., 183) and by Judge Wallace, of the Circuit Court of the United States, in Wallace *v.* Myers (38 Fed. Rep., 184), and in both cases it was held that the inclusion of United States bonds in the valuation under the laws for the taxation of inheritances, for the purpose of ascertaining the tax, was a valid exercise of the legislative power of a State, and did not constitute a taxation of Federal securities. We concur in the conclusions reached in these cases, which are amply supported by the authorities and reasoning upon which they proceed.

We return, therefore, to the question originally stated, whether the act of 1892 exempts United States bonds from valuation in fixing the tax. Unless such exemption is found the bonds in this case should have been included in the valuation. The case of Wallace *v.* Myers (*supra*) was brought in the United States Court, and was governed by the Act of 1887 (Chap. 713). By the first section of that Act the tax was imposed upon "all property" passing by will or by the intestate laws of the State. There was no limitation of this language in the subsequent sections of the Act, and it was held, as we think properly, that United States bonds were to be valued in fixing the tax. The Act of 1892 contains a new provision, not

found in the prior Acts. The 22d section declares that the words "estate" and "property," as used in the Act "shall include all property or interest therein, whether situated within or without this State, over which this State has any jurisdiction for the purposes of taxation." We had occasion in the Matter of Whiting (150 N. Y., 27), to consider the application of this clause of section 22 of the Act of 1892 to a case of United States bonds owned by a non-resident decedent on deposit at the time of his death with other securities in the vaults of a safe deposit company in the City of New York. The objection was taken that they could not be included in the valuation under the Act of 1892, and this Court sustained the objection on the ground that the bonds, being property not subject to the taxing power of the State, were exempt from valuation under the definition of property in section 22. It was probably the primary purpose of this definition to exclude any inference from the generality of the words used in the first section of the Act, that the valuation to be made should include the real property of resident decedents situated outside of the State. (See In re Swift, 137 N. Y., 77.) But the language extends to all property not within the taxing power of the State, and Federal securities are plainly within the definition. It is the jurisdiction of the State to subject property to taxation under its general taxing power, and not whether the jurisdiction has been exercised, which is the test of exemption under section 22 of the Act of 1892. Property of every description passing by will or under the Statutes of Descents or Distributions, which is subject to the taxing power of the State, is to be valued under the Act, irrespective of the fact whether it has or has not been subjected to taxation under existing laws. (Matter of Knoedler, 140 N. Y., 377.) But we are of opinion that the United States bonds were properly excluded from the valuation of the decedent's estate by the Surrogate by force of section 22 of the Act of 1892. (Judges Gray, O,Brien, Bartlett, Haight, Martin and Vann concur.)

In *Wallace* v. *Myers*, 38 Fed. Rep., 184, it was held:

"*Where the property of the decedent includes United States*

bonds, the tax may be assessed upon the basis of their value. The tax is not imposed upon the bonds, but is merely a tax upon the privilege of acquiring property by inheritance."

Judge Wallace says at p. 185:

"This question is fairly a debatable one, but seems to be satisfactorily answered by the consideration that the tax is not imposed upon the bonds, but is one upon the privilege of acquiring property by inheritance. The circumstance that incidentally under such a statute such bonds may have to be valued in order to ascertain the amount of the tax does not affect its essential nature as one upon the privilege, and not upon the bonds. The statute exacts compensation in the form of a tax, and measures the price according to the value of the inheritance; and the only purpose and effect of valuing the bonds when they form a part of a decedent's estate is to ascertain and measure the value of the privilege. * * *

"The bonds are the subject of the appraisal, but the privilege is the subject of the tax. Inasmuch as it is lawful for the State to withhold altogether the privilege of acquiring property within its domain by will or inheritance, whether the property consists of government bonds or anything else, it is lawful for the legislature to annex any conditions to the privilege which may seem expedient and do not conflict with the organic law of the state, or the constitution or laws of the United States. In the language of the Court in Mager *v.* Grima, where a similar statute was under consideration:

"'The law in question is nothing more than the exercise of the power which every state and sovereignty possessed, of regulating the manner and terms upon which property real or personal within its dominion may be transmitted by last will and testament, or by inheritance, and of prescribing who shall and who shall not be capable of taking it.'

"The terms of the Act of Congress of June 30, 1864 (13 U. S. Stat., 285), taxing legacies and successions are quite similar to those of the present statute in respect to the valuation for assessment. The subject-matter of the assessment under that Act was held by the Supreme Court in Scholey *v.* Rew, 23 Wall., 331, to be the devolution of the estate, or the right to become beneficially entitled to it; and the act was considered as taxing a privilege, and not the property. In Virginia the highest court of the State has construed a similar statute as imposing the tax,

not upon the property, but upon the privilege of acquiring it by will or under the intestate laws. Eyre *v.* Jacob, 14 Grat., 422; Miller *v.* Com., 27 Grat., 110. The precise question now presented was considered by the Supreme Court of Pennsylvania in Strode *v.* Com., 52 Pa. St., 181, and the Court treated the statute, not as taxing property, but as a regulation of the transmission of the property of decedents; and upon that view held that government securities were properly included in the valuation of the inheritance upon which the tax was assessed. If such statutes are to be regarded as taxing a privilege, and not property, then the cases of Society *v.* Coite, 6 Wall., 594, and Institution *v.* Massachusetts, Id., 631, furnish by analogy the rule which should be applied in the present case. In the latter case the Court used the following language:

"'Granting that it is not a property tax, then it must be considered as a franchise tax laid upon the corporation for the privileges conferred by the charter, which, by all the authorities, it is competent for the state to tax, irrespective of what disposition the institution has made of the funds, or in what manner they may have been invested.'

"Accordingly the Court held in those cases that, although by the statute imposing the tax the amount was to be ascertained by the amount of the deposits of the corporation, the circumstance that those deposits were invested in government securities was not material. The case of People *v.* Insurance Co., 92 N. Y., 328, affirmed by the Supreme Court in Insurance Co. *v.* New York, 119 U. S., 129, 8 Sup. Ct. Rep., 1385, is also instructive. There a statute of New York imposed the tax upon the franchises of corporations within the State, to be assessed upon the amount of the dividends upon the capital stock. The Court held that in ascertaining the basis for computing the amount of the tax, the portion of the dividends derived from the investment of the corporation in United States securities was not to be deducted. No opinion was promulgated by the Supreme Court in deciding this case. It is to be observed, however, that it was not even contended for the corporation in that court that the tax was to any extent void or excessive if it was a franchise tax, but the contention was that it was in effect a tax upon the property of the corporation, and therefore void, so far as it was based upon property in the form of United States securities. In any view, the Court must have held that if it was a franchise tax the valuation of United States securities as a basis of assessment was permissible. The authorities thus referred to should control the de-

cision of the present case, in the absence of any decision directly in point by the Supreme Court."

In *Strode* v. *Commonwealth*, 52 Pa. St., 181, where United States bonds were appraised, BUTLER, P. J., says at p. 182:

"In McCulloch *v.* Maryland, 4 Wheat., 316, the Supreme Court of the United States declared that the several States' have no power by taxation or otherwise, to retard, impede, burthen or in any way control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government.' And this principle is affirmed by the cases of Weston *v.* The City of Charleston, 2 Peters, 449; Osborne *v.* The Bank of the United States, 9 Wheat., 738; Dobbin *v.* The Commissioners of Erie County, 16 Peters, 435; Bank of Commerce *v.* The Commissioners, 2 Black, 620; and the Bank Tax cases in 2 Wallace, 200. And it was, therefore, decided that the States cannot impose taxes on the banks formerly established under the laws of the general government, nor on the offices held by the government's agents. It would seem to be clear, therefore, independently of the prohibition contained in the statutes authorizing the recent loans, that the States cannot tax the bonds issued by the general government. In the case before us it is urged that what is claimed by the plaintiff is not a tax. But if this were determined to be so, it would not seem to advance us in the inquiry which the case presents. If not a 'tax' it is certainly a *burthen*, and if imposed on bonds of the United States, or on the owner of such bonds, in respect to them, it would be obnoxious to the objection which the defendant makes. But is it imposed on the bonds or on an owner of them? What is called a collateral inheritance tax, is a bonus, exacted from the collateral kindred and others, as the condition on which they may be admitted to take the estate left by a deceased relative or testator. The estate does not belong to them, except as a right to it is conferred by the State. Independently of government no such right could exist. The death of the owner of property would necessarily terminate his control over it, and it would pass to the first who might obtain possession. The right of the owner to transfer it to another after death, or of kindred to succeed, is the result of municipal regulation, and must, consequently, be enjoyed subject to such conditions as the State sees fit to impose. See Black. Com., 2d book, pp. 10, 11, 12, 13. And we see the State continually imposing new conditions; some-

times enlarging, at others restraining, the privilege, and sometimes again entirely taking it away, by changing the parties who are to succeed. In Pennsylvania up to 1833 we followed the rule of the common law in ascertaining the 'next of kin.' Since that time we have pursued the rule of the civil law, which by employing a different mode of computation frequently confers the estate on an entirely different class of kindred. Up to 1855, if an intestate left brothers and sisters entitled to inherit, and also the grandchildren of a deceased brother or sister (their immediate parents also being dead), the brothers and sisters took the entire estate. Since that time they are required to share it with the grandchildren. Up to the same period when nephews and nieces, the children of several brothers and sisters, alone were entitled to inherit, they shared the estate equally. Since that time they take *per stirpes*, so that if there be six, one of them representing one deceased brother, and the other five another, this one now takes as much as the other five. These instances are sufficient for illustration; they might be almost indefinitely multiplied. They show how instantly the State asserts its right to control the disposition of decedents' estates. And it does so whether there be a will or not. If the decedent leaves a wife, the State gives her more than one-third of his personalty and a share of his realty, though he may have willed otherwise. Blackstone in speaking of this subject says: 'Nothing varies more than the right of inheritance and testament, under the different national establishments. In England particularly is this diversity carried to such a length as if it had been meant to point out the power of the law in regulating the succession to property, and how futile every claim must be that has not its foundation in the positive rules of the State. For instance, in personalty the father may succeed to his children; in landed property he never can be their heir by the remotest possibility. In general only the eldest son, in some places only the youngest, in others all the sons together, have a right to succeed to the inheritance. In realty males are preferred to females, and the eldest male will usually exclude the rest, while in the disposition of the personalty females are admitted with the males, and no right of primogeniture is allowed.'

"I repeat, therefore, as the right to take by succession and testament is derived from the State, it must necessarily be enjoyed subject to such conditions as the State may impose. And if a condition be that the kindred or legatees shall pay a bonus, this is not a tax or burthen imposed on *their property*, or on the prop-

erty of anybody else. It is simply the price of the privilege which the State has conferred upon them. If they do not choose to avail themselves of the privilege they need not pay the price, and are no worse off than before."

In *Clymer* v. *The Commonwealth*, 52 Pa. St., at p. 186, CHAPMAN, P. J., says:

"But the view entertained by the Court is, that no Act of Congress impinges upon the collateral inheritance law. This law contemplates the imposition of no tax such as Congress intended to prohibit. It is called a tax or duty, but has little, if any, analogy to a tax in the usual acceptance of the term. It cannot be regarded as a penalty exactly, but it approximates that as nearly as it does an ordinary tax. It is assessed but once. The claim is made as against a particular class of persons. It is the relation of the person, who claims the estate, to the decedent which constitutes the ground upon which the abatement is authorized. This is the condition upon which the collateral beneficiary is entitled to receive a decedent's estate. The legislature have a constitutional right to prescribe the mode of descent of intestates' estates, and as the right to make a will is by legislative authority, what is to prevent the legislature from declaring prospectively, that legitimate and illegitimate children shall take in equal shares, even against the attempt of the parent to the contrary by will? Now, this is not to be viewed as a tax assessed upon the estate of the decedent or of anyone, but a restriction upon the right of acquisition by those who under the law regulating the transmission of property are entitled to take as beneficiaries without consideration. The State is made one of the beneficiaries. It lays its hands upon estates under such circumstances, and claims a share, and whether the share is exacted as a tax or duty or whatsoever else, or the machinery employed in levying an ordinary tax is adopted or not, is of no consequence. The constitutional authority of the State cannot be denied; Short's Estate, 4 Harris, 63. The act of the legislature is not liable to the imputation that it countenances the appropriation of private property for public use without consideration, for the estate never vests without the charge. If the position of the defendant were correct, supposing a decedent's estate consisted wholly of United States securities, no abatement could be made on account of fees of officers, &c., for this description of property

would be beyond the reach of State legislation, and the executors would have to pay out of their own pockets, whatever is prescribed by the fee bill or tax law. On the supposition that the estate consisted wholly of interest-bearing notes, which would come within the term 'other securities' as used in the proviso to the Act of February 25th, 1862, and recognized as money, it can hardly be supposed the claim of exemption would be asserted, and as the case stands no difference is perceived."

In *Strode* and *Clymer* v. *Comm.*, 52 Pa. St., on appeal, WOODWARD, C. J., says, at page 188:

"The simple question is, whether our collateral inheritance tax is applicable to that part of the decedent's estate which consisted of bonds of the United States that were by law exempted from State taxation. And the opinion of the learned Judge below is so satisfactory as to leave very little for us to add. The mistake of the learned counsel for the plaintiff in error consists, we conceive, in treating this as a tax of the government bonds, when it is really a tax upon a decedent's estate, dying without lineal heirs. And it does not help the argument, that the bulk of the estate is made up of these bonds.

* * * * * * * * *

"Therefore, neither the prohibitory clause of the Act of Congress of 1862, nor any of the principles of decision against State authority to tax that which the Federal authority has exempted from taxation, have any application here. The Federal Government has not prohibited the States from prescribing rules of inheritance and succession to estates of decedents, and it would be a grievous mistake of legislative and judicial authority to apply it with such effect."

In *Matter of Howard*, 5 Demarest, 483, Surrogate ROLLINS held that the tax imposed by the Act of 1885 was not upon property, but upon the passing thereof, and the fact that a portion consisted of government bonds was immaterial.

ROLLINS, S., says, in his exhaustive opinion at page 489:

"If the tax in dispute is in a strict sense a tax upon property, it may be claimed, with much force, that a decedent's estate, so

far as it consists of United States bonds, is wholly exempt from taxation. If, on the other hand, the tax is imposed upon the 'passing' of such decedent's property, the question whether the property consists in whole or in part of United States bonds is wholly immaterial.

"The doctrine asserted by Sir William Blackstone in Chapter 1, Book 2 of his Commentaries, has been repeatedly asserted by the courts in this country. 'The universal law of almost every nation,' he says, 'has given a dying person a power of continuing his property by disposing of his possessions by will; or, in case he neglects to dispose of it or is not permitted to make any disposition of it at all, the municipal law of the country steps in and declares who shall be the successor, representative or heir of the deceased * * * and in case no testament be permitted by the law, or none be made, and no heir can be found so qualified as the law requires * * * the doctrine of escheats is adopted in almost every country, whereby the sovereign of the State, and those who claim under his authority, are the ultimate heirs and succeed to those inheritances to which no other title can be founded. * * * Wills, therefore, and testaments, rights of inheritance and successions are all of them creatures of the civil or municipal law, and accordingly are in all respects regulated by them.'"

"The sovereign power of this State may, if it chooses, abrogate the existing statutes of wills and of distribution, and, as regards personal property that may be possessed at his death by any person residing within its limits, may direct that the same shall become exclusively the property of the State. If it can thus exert absolute authority in the premises it may of course wield such limited authority as it may see fit to exercise. It may appropriate to itself a prescribed portion of the decedent's possessions and permit his kindred or the objects of his testamentary bounty to enjoy the rest.

"The legislature of New York had power, therefore, to declare, at the time of the enactment of the law here in question, that henceforth the personal estate of a resident decedent, in excess of the sum necessary for discharging his debts, should not all of it pass, and as it would theretofore have passed, to his legatees or his next of kin; that only ninety-five per centum thereof should so pass, and that the remaining five per centum should escheat to the State. This authority was in no manner dependent upon the character of the decedent's property. Even if it should consist exclusively of United States bonds, the State

had power to direct that five per centum of the whole amount of such bonds should flow into its treasury."

EXTRACTS FROM THE OPINIONS IN THE OTHER CASES WHERE UNITED STATES BONDS HAVE BEEN APPRAISED HAVE NOT BEEN PRINTED AS THEY ARE SIMILAR TO THE ABOVE.

PLUMMER *v.* COLER.

ERROR TO THE SURROGATE'S COURT OF THE COUNTY OF NEW YORK, STATE OF NEW YORK.

No. 489. Argued February 27, 28, 1900. — Decided May 14, 1900.

The right to take property by will or descent is derived from and regulated by municipal law; and, in assessing a tax upon such right or privilege, the State may lawfully measure or fix the amount of the tax by referring to the value of the property passing; and the incidental fact that such property is composed, in whole or in part, of Federal securities, does not invalidate the state tax, or the law under which it is imposed.

The relation of the individual citizen and resident to the State in which he resides is such that his right, as the owner of property, to direct its descent by will or permit its descent to be regulated by statute, and his right as legatee, devisee or heir to receive the property of his testator or ancestor, are rights derived from and regulated by the State; and no sound distinction can be drawn between the power of the State, in imposing taxes upon franchises of corporations, composed of individual persons, and in imposing taxes upon the right or privilege of individuals to avail themselves of the right to grant and to receive property under the statutes regulating the descent of the property of decedents.

Joseph Plummer, a citizen and resident of New York, died October 28, 1898, leaving a last will whereby he bequeathed to Harry Plummer, his executor, forty thousand dollars in United States bonds, issued under the Funding Act of 1870, in trust, to hold the same during the lifetime of Ella Plummer Brown, daughter of the testator, and to pay the income thereof to her during her life, and at her death to divide the same between and amongst her issue then living.

The value of this life interest was computed by the appraisers at the sum of $16,120, and a tax of $161.20 was imposed thereon by the surrogate of the county of New York. From this appraisal and the order imposing the tax an appeal was taken to the Surrogate's Court of the county and State of New York, where the following stipulation was filed:

"It is stipulated and agreed by and between the attorneys for the respective parties to the above-entitled proceedings that

the forty thousand dollars in amount at par of bonds of the United States of America, of which the said Joseph Plummer died possessed, and upon the interest in which of Ella Plummer Brown a tax of $161.20 was fixed, assessed and determined by the order appealed from, consist of four per cent bonds issued in the year 1877 and due in the year 1907, under and by virtue of and pursuant to the statute of the United States, passed July 14, 1870, entitled 'An act to authorize the refunding of the national debt,' which authorized the Secretary of the Treasury, among other things, to issue various classes of bonds in the sums therein mentioned, including 'a sum or sums not exceeding in the aggregate one thousand million dollars of like bonds, . . . payable at the pleasure of the United States after thirty years from the date of their issue, and bearing interest at the rate of four per cent per annum; all of which said several classes of bonds and the interest thereon shall be exempt from the payment of all taxes or duties of the United States, as well as from taxation in any form by or under state, municipal or local authority; and the said bonds shall have set forth and expressed upon their face the above specified conditions;' and that pursuant to said statute there is set forth on the face of each of said bonds the following clause, that is to say: 'The principal and interest are exempt from the payment of all taxes or duties of the United States, as well as from taxation in any form by or under state, municipal or local authority.'"

On December 22, 1899, the Surrogate's Court affirmed the appraisal and the order imposing a tax. Thereupon Harry Plummer, executor, appealed to the appellate division of the Supreme Court of the State of New York, which court on January 5, 1900, affirmed the order of the surrogate and the decree of the Surrogate's Court. From this decree of the appellate division of the Supreme Court an appeal was taken to the Court of Appeals of the State of New York, where, on January 8, 1900, the proceedings and order of the surrogate and the decree of the appellate division were affirmed.

In the notice of appeal to the Surrogate's Court and in that of the appeal to the Court of Appeals the grounds of appeal were stated to be the invalidity of the statute of New York pur-

porting to impose a tax upon a transfer by legacy of bonds of the United States, and the invalidity of the statute of the State of New York and of the authority exercised thereunder by the appraiser and the surrogate, in so far as United States bonds were concerned. And the appellant specially set up and claimed a title, right, privilege and immunity under the Constitution of United States, and under the statute of the United States in respect to the exemption of said bonds from state taxation in any form.

On January 9, 1900, a writ of error was sued out from this court.

Mr. William V. Rowe and *Mr. Treadwell Cleveland* for plaintiff in error.

Mr. Jabish Holmes, Jr., and *Mr. Edgar J. Levey* for defendant in error.

Mr. Justice Shiras, after stating the case, delivered the opinion of the court.

In this case we are called upon to consider the question whether, under the inheritance tax laws of a State, a tax may be validly imposed on a legacy consisting of United States bonds issued under a statute declaring them to be exempt from state taxation in any form.

It is not open to question that a State cannot, in the exercise of the power of taxation, tax obligations of the United States. *Weston* v. *Charleston*, 2 Pet. 449; *Bank of Commerce* v. *New York City*, 2 Black, 620; *Home Insurance Co.* v. *New York*, 134 U. S. 594, 598.

So, likewise, it is settled law that bonds issued by a State, or under its authority by its public municipal bodies, are not taxable by the United States. *Mercantile Bank* v. *New York*, 121 U. S. 138; *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 583.

The reasoning upon which these two lines of decision proceed is the same, namely, as was said by Mr. Justice Nelson in *Col-*

lector v. *Day*, 11 Wall. 113, 124: "The general government and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the Tenth Amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States;" and, as was said by Mr. Chief Justice Fuller, in *Pollock* v. *Farmers' Loan & Trust Company*, 157 U. S. 537: "As the States cannot tax the powers, the operations or the property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a State."

As, then, for the reasons advanced and applied in the previous cases, it is not within the power of a State to tax Federal securities, it was not necessary for Congress, in order to secure such immunity, to declare in terms, in the act of July 14, 1870, and on the face of the bonds issued thereunder, that the principal and interest were exempt from taxation in any form by or under state, municipal or local authority. Such a declaration did not operate to withdraw from the States any power or right previously possessed, nor to create, as between the States and the holders of the bonds, any contractual relation. It doubtless may be regarded as a legitimate mode of advising purchasers of such bonds of their immunity from state taxation, and of manifesting that Congress did not intend to waive this immunity, as it had done in the case of national banks, which are admittedly governmental instrumentalities.

With these concessions made, we are brought to the pivotal question in the case, and that question is thus presented in the second point discussed in the brief filed for the plaintiff in error. "If the question of the right of the State to impose the tax now in question be considered merely with reference to the inherent lack of power of the State to impose such a tax, because of the provisions of the Constitution of the United States bearing upon

that question, without any aid from the statute of the United States under which these bonds were issued, or the exemption clause contained in the bonds, we conceive it to be entirely clear that the tax in question is unconstitutional, because impairing and burdening the borrowing power of the United States." Or, as stated elsewhere in the brief: "The States have no power to impose any tax or other burden which would have the effect to prevent or hinder the government of the United States from borrowing such amounts of money as it may require for its purposes, on terms as beneficial and favorable to itself, in all respects, as it could do if no such tax were imposed by the State."

It will be observed that these propositions concede that the tax law of the State of New York in question does not expressly, or by necessary implication, propose to tax Federal securities. It is only when and if, in applying that law to the estates of decedents, such estates are found to consist wholly or partly of United States bonds, that the reasoning of the plaintiff in error, assailing the validity of the statute, can have any application. And the contention is that individuals, in forming or creating their estates, will or may be deterred from offering terms, in the purchasing of such bonds, as favorable as they otherwise might do, if they are bound to know that such portion of their estates as consists of such bonds is to be included, equally with other property, in the assessment of an inheritance tax.

Before addressing ourselves directly to the discussion of these propositions we shall briefly review the decisions in whose light they must be determined.

And, first, what is the voice of the state courts?

A detailed examination of the state decisions is unnecessary, because it is admitted, in the brief of the plaintiff in error that in many, if not in most, of the States of the Union inheritance or succession tax laws, similar to the New York statute in question, are and have been long in operation, and that the question of their validity, in cases like the present, has always heretofore been determined by the state courts against the United States. We cannot, however, accede to the suggestion in the brief that

the state decisions are entitled to but little consideration, for the reason that "they are the determinations of a distinct sovereignty, adjudicating upon the rights of the nation, and naturally jealous of their own." Undoubtedly, in a case like the present, the national law is paramount, and its final exposition is for this court. Still, for reasons too obvious to require statement, the decisions of the state courts, particularly if they are uniform and concur in their reasoning, are worthy of respectful consideration, even if the question be, at last, a Federal one.

Without attempting a rehearsal of the state decisions, we may profitably examine the reasons and conclusions of several of the leading state courts.

A statute of Massachusetts of 1862 provided that every institution for savings, incorporated under the laws of that State, should pay a tax on account of its depositors, on the average amount of its deposits. The Provident Institution of Savings, a corporation having no property except its deposits and the property in which they were invested, and authorized by the general statute of Massachusetts to receive money on deposit and to invest its deposits in securities of the United States, had on deposit on the 1st day of May, 1865, $8,047,652—of which $1,327,000 stood invested in public funds of the United States exempt by law of the United States from taxation under state authority. The company declined to pay that portion of the tax on its property invested in United States bonds. On suit brought by the Commonwealth to recover the same, the Supreme Judicial Court of Massachusetts, regarding the tax as one on franchise, and not on property, held the tax to be lawful. *Commonwealth* v. *Provident Institution*, 12 Allen, 312.

By a subsequent statute of 1864, c. 208, corporations having capital stock divided into shares were required to pay a tax of a certain percentage upon "the excess of the market value" of all such stock over the value of its real estate and machinery. The Hamilton Manufacturing Company refused to pay the tax upon that portion of its property which was invested in United States securities, because, by the act of Congress authorizing their issue, they were exempt from taxation by state authority.

It was held by the Supreme Judicial Court of Massachusetts that the tax was to be regarded as a tax on the franchise and privileges of the corporation, and was lawful so far as related to Federal securities. *Commonwealth* v. *Hamilton Company*, 12 Allen, 298, 300.

The legislature of Connecticut in 1863 enacted that the savings banks in the State should annually pay to the treasurer of the State a sum equal to three fourths of one per cent on the total amount of deposits. The "Society for Savings," a corporation of Connecticut, refused to pay the tax upon that portion of its deposits which was invested in United States bonds, declared by act of Congress to be exempt from taxation by state authority.

On a suit brought by Coite, treasurer of the State, to recover the tax thus withheld, the Supreme Court of Connecticut decided that the tax in question was not a tax on property, but on the corporation as such, and rendered judgment accordingly for the plaintiff. *Coite* v. *Savings Bank*, 32 Conn. 173.

In Pennsylvania it has been repeatedly held that the collateral inheritance law of that State, imposing a tax upon the total amount of the estates of decedents, is valid, although the estate may consist in whole or in part of United States bonds; and this upon the principle that what is called a collateral inheritance tax is a bonus, exacted from the collateral kindred and others, as the conditions on which they may be admitted to take the estate left by a deceased relative or testator; that the estate does not belong to them, except as a right to it is conferred by the State; that the right of the owner to transfer it to another after death, or of kindred to succeed, is the result of municipal regulation, and must, consequently, be enjoyed subject to such conditions as the State sees fit to impose. *Strode* v. *Commonwealth*, 52 Penn. St. 181; *Clymer* v. *Commonwealth*, 52 Penn. St. 181, 186.

In Virginia the highest court of the State has construed a similar statute as imposing the tax, not upon the property, but upon the privilege of acquiring it by will or under the intestate laws. *Eyre* v. *Jacob*, 14 Grat. 422; *Miller* v. *Commonwealth*, 27 Grat. 110.

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The Supreme Court of Illinois has held valid a statute of that State, entitled "An act to tax gifts, legacies and inheritances in certain cases, and to provide for the collection of the same." Rev. Stat. Ill. 1895, c. 120. The constitutionality of the act was denied, because of the alleged want of reasonableness in its classification of those subject to the tax and the want of equality in the amounts imposed. But the Supreme Court held that an inheritance tax is a tax not upon property, but on the succession, and that the right to take property by devise or descent is the creature of the law, a privilege, and that the authority which confers the privilege may impose conditions upon it. *Kochersperger* v. *Drake*, 167 Illinois, 122.

By an act of the legislature of New York, Laws of 1881, c. 361, p. 481, it was enacted that "every corporation, joint stock company or association whatever, now or hereafter incorporated or organized under any law of this State, . . . shall be subject to and pay a tax, as a tax upon its corporate franchise or business, into the treasury of the State, annually, to be computed as follows: If the dividends made or declared by such corporation, joint stock company or association during any year ending with the first day of November amount to more than six per centum upon the par value of its capital stock, then the tax to be at the rate of one quarter mill upon the capital stock for each one per centum of dividend so made or declared," etc.

The Home Insurance Company, a corporation of the State of New York, having a capital stock of $3,000,000, declared a dividend of ten per cent for the year 1881. During the year 1881 the company had part of its capital invested in United States bonds, exempt from state taxation. The amount so invested changed from $3,300,000 to $1,940,000 in such bonds during the year 1881. The company, in tendering payment of its tax, claimed that so much of the laws of New York as required a tax to be paid upon the capital stock of the company, without deducting from the amount so to be paid that part invested in bonds of the United States, was unconstitutional and void. In an action brought to recover such unpaid portion of the tax, the Supreme Court of New York, at general term, ad-

judged that the company was liable to pay such tax; and this judgment was affirmed by the Court of Appeals. The view of those courts was that, the tax being upon the franchise of the company, it mattered not how its capital stock or property may be invested, whether in United States securities or otherwise. *N. Y. & Home Insurance Co.* v. *New York*, 92 N. Y. 328.

In *Monroe Savings Bank* v. *Rochester*, 37 N. Y. 365, it was said:

"It is true that where a tax is laid upon the property of an individual or a corporation, so much of their property as is vested in United States bonds is to be treated, for the purposes of assessment, as if it did not exist, but this rule can have no application to an assessment upon a franchise, where a reference to property is made only to ascertain the value of the thing assessed. It is, however, argued with great ingenuity and skill that, inasmuch as the plaintiffs, among other powers given them, have the right to invest their moneys in United States bonds, their franchises and privileges cannot be taxed by the State. The power thus to invest their money, it is contended, is a franchise for lending to the United States, and therefore cannot be taxed, because such taxation would trench on the power of the United States to borrow. This is stretching the argument too far. It cannot be pretended that the State would violate any obligation resulting from the power of the United States to borrow money, if the law conferring the power upon the plaintiff to invest their money in United States stocks and bonds were repealed. The State is under no obligation, express or implied, to legislate to enhance the credit of the general government, and should it adopt a system of legislation which indirectly produces such a result, its power of repeal cannot be doubted. The position, that a franchise granted by the bounty of the State is not taxable, because coupled with that franchise is the privilege of loaning money to the general government, is not more untenable than to argue that, because such a franchise enhances the credit of the United States, therefore the legislature could not repeal the law granting the franchise without violating its constitutional obligation. Suppose the legislature had limited the amount in which the plaintiff

could invest its money in the securities of the United States, it will not be contended that such limitation would be void because it impaired the power of the United States to borrow money. It must, therefore, be regarded as sound doctrine to hold that the State, in granting a franchise to a corporation may limit the powers to be exercised under it, and annex conditions to its enjoyment, and make it contribute to the revenues of the State. If the grantee accepts the boon it must bear the burden."

In *Matter of Sherman*, 153 N. Y. 1, it was said by the Court of Appeals of New York, per Chief Judge Andrews, that—

"This court has not been called upon to consider the question of the power of the State to prescribe that in ascertaining the value of the property of a decedent for the purpose of fixing the tax, under the collateral inheritance or transfer tax laws, the value of Federal securities owned by the decedent shall be included. But we apprehend that the existence of the power cannot be denied upon reason or authority. The tax imposed is not, in a proper sense, a tax upon the property passing by will, under the statutes of descents or distribution. It is a tax upon the right of transfer by will, or under the intestate law of the State. Whether these laws are regarded as a limitation on the right of a testator to dispose of property by will, or upon the right of devisees to take under a will, or the right of heirs or next of kin to succeed to a property of an intestate, is immaterial. The so-called tax is an exaction made by the State in the regulation of the right of devolution of property of decedents, which is created by law, and which the law may restrain or regulate. Whatever the form of the property, the right to succeed to it is created by law, and if the property consists of government securities, the transferee derives his right to take them as he does his right to take any other property of the decedent, under the laws of the State, and the State by these statutes makes the right subject to the burden imposed."

And in the case in hand, the very matter of complaint is that the courts of the State of New York held that, under the laws of that State, an inheritance tax can be validly assessed

against the entire estate of a decedent, although composed in greater part of United States bonds; and the language of the surrogate, affirmed by the Court of Appeals, was as follows:

"It is almost unnecessary to state that the theory on which the courts have held this kind of security taxable is that the tax is not upon the bonds themselves, but upon the transfer thereof. This distinction is firmly established in this State. See, besides the *Sherman case*, *Matter of Merriam*, 141 N. Y. 479; *Matter of Bronson*, 150 N. Y. 1; and it seems to have been recognized in the Supreme Court of the United States, 163 U. S. 625, *United States* v. *Perkins*, in which *Matter of Merriam* was affirmed."

The decisions of the state courts may be summarized by the statement that it is competent for the legislature of a State to impose a tax upon the franchises of the corporations of the State, and upon the estates of decedents resident therein, and in assessing such taxes and as a basis to establish the amount of such assessments, to include the entire property of such corporations and decedents, although composed, in whole or in part, of United States bonds; and that the theory upon which this can be done consistently with the Constitution and laws of the United States is that such taxes are to be regarded as imposed, not upon the property, the amount of which is referred to as regulating the amount of the taxes, but upon franchises and privileges derived from the State.

Let us now proceed to a similar survey of the Federal authorities on this subject.

Mager v. *Grima*, 8 How. 490, was a case where, by the law of Louisiana, a tax of 10 per cent was imposed on legacies, when the legatee is neither a citizen of the United States nor domiciled in that State, and the executor of the deceased or other person charged with the administration of the estate was directed to pay the tax to the state treasurer. Felix Grima was the executor of John Mager, and retained the amount of the tax in order to pay it over as the law directed. Suit was brought by a legatee to recover it, upon the ground that the act of Louisiana was repugnant to the Constitution of the United States. The validity of the act was sustained by

the state courts, and the cause was brought to this court. The judgment of the state courts was here affirmed, and it was said, in the opinion delivered by Chief Justice Taney:

"Now the law in question is nothing more than an exercise of the power which every State and sovereignty possesses, of regulating the manner and terms upon which property, real or personal, within its dominion may be transmitted by last will and testament, or by inheritance, and of prescribing who shall and who shall not be capable of taking it. Every State or nation may unquestionably refuse to allow an alien to take, either real or personal property, situated within its limits either as heir or legatee, and may, if it thinks proper, direct that property so descending or bequeathed shall belong to the State. In many of the States of this Union at this day real property devised to an alien is liable to escheat. And if a State may deny the privilege altogether, it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy. This has been done by Louisiana. The right to take is given to the alien, subject to a deduction of ten per cent for the use of the State."

In *Van Allen* v. *The Assessors*, 3 Wall. 573, it was held that it was competent for Congress to authorize the States to tax the shares of banking associations organized under the act of June 3, 1864, without regard to the fact that a part or the whole of the capital of such association was invested in national securities declared by the statutes authorizing them to be "exempt from taxation by or under state authority." This decision has ever since been acted upon, and its authority has never been questioned by any court, and from it we learn that there is no undeviating policy that, at all times and in all circumstances, the tax system of the States shall not extend to Federal securities.

The next cases to be noted are: *Society for Savings* v. *Coite*, 6 Wall. 594; *Provident Insurance Co.* v. *Massachusetts*, 6 Wall. 611; and *Hamilton Company* v. *Massachusetts*, 6 Wall. 632.

In these cases this court affirmed the Supreme Courts of Connecticut and Massachusetts in holding that state taxes may be imposed, the amount of which may be determined by the ag-

gregate amount of the property or capital stock of banking and manufacturing companies, even if such property or capital stock includes United States bonds issued under a statute declaring them exempt from taxation under state authority.

As we have already seen, when referring to the state decisions, the reasoning upon which the state courts proceeded in the case of corporations was that such taxes were to be deemed as laid, not upon the bonds as property, but upon the franchise to do business as a corporation or association derived from the State. This reasoning was approved by this court; and it may be observed in passing that, as appears in the reports of the arguments of counsel, the contention so strongly pressed in the present case, namely, that under no form can Federal securities be practically rendered by state legislation less valuable, was fully argued. See also the case of *Scholey* v. *Rew*, 23 Wall. 331.

Next worthy of notice is the case of *Home Insurance Company* v. *New York*, 134 U. S. 594. It came here on error to the Supreme Court of the State of New York, whose judgment had been affirmed by the Court of Appeals, and was twice argued. The question considered was whether a statute of the State of New York was valid in respect to imposing a tax upon a New York corporation, measured and regulated by the amount of its annual dividends, where those dividends were partly composed of interest of United States bonds owned by the corporation.

As we have heretofore stated, the state courts answered this question in the affirmative, basing their decision upon the proposition that the tax was imposed as a tax upon corporate franchises or privileges, and that such a tax was not invalidated by the circumstance that the measure of its amount was fixed by the amount of the annual dividends of the company partly derived from the interest of United States bonds. 92 N. Y. 328.

In this court the question was elaborately argued, as may be seen in the first report of the case in 119 U. S. 129; and it was again contended that the case fell within the principle of public policy that the States have no power, by taxation or otherwise, to retard, impede, burden or in any manner control the opera-

tions of the instrumentalities of the national government, and also that the tax in question was repugnant to the Fourteenth Amendment of the Constitution of the United States.

The reasoning of the state court was substantially approved and their judgment, sustaining the validity of the state statute was affirmed. Some of the observations of the opinion of the court, delivered by Mr. Justice Field, may be appropriately quoted:

"Looking now at the tax in this case, we are unable to perceive that it falls within the doctrine of any of the cases cited, to which we fully assent, not doubting their correctness in any particular. It is not a tax in terms upon the capital stock of the company, nor upon any bonds of the United States composing a part of that stock. The statutes designate it a tax upon the 'corporate franchise or business' of the company, and reference is only made to its capital stock and dividends for the purpose of determining the amount of the tax to be exacted each year.

"By the term 'corporate franchise or business,' as here used, we understand is meant (not referring to corporations sole, which are not usually created for commercial business) the right or privilege given by the State to two or more persons of being a corporation, that is, of doing business in a corporate capacity, and not the privilege or franchise which, when incorporated, the company may exercise. The right or privilege to be a corporation, or to do business as such body, is one generally deemed of value to the corporators, or it would not be sought in such numbers as at present. It is a right or privilege, by which several individuals may unite themselves under a common name and act as a single person, with a succession of members, without dissolution or suspension of business, and with a limited individual liability. The granting of such right or privilege rests entirely in the discretion of the State, and, of course, when granted, may be accompanied with such conditions as its legislature may judge most befitting to its interests and policy. It may require, as a condition of the grant of the franchise, and also of its continued exercise, that the corporation pay a specific sum to the State each year or month, or a specific portion of its gross receipts, or of the profits of its business, or a sum to be

ascertained in any convenient mode which it may prescribe. The validity of the tax can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount for any year, which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privilege it bestows. It may well seek in this way to increase its revenue to the extent to which it has been cut off by exemption of other property from taxation. As its revenues to meet its expenses are lessened in one direction, it may look to any other property as sources of revenue, which is not exempt from taxation. . . . The tax in the present case would not be affected if the nature of the property in which the whole capital stock is invested were changed, and put into real property or bonds of New York, or of other States. From the very nature of the tax, being laid upon a franchise given by the State, and revocable at pleasure, it cannot be affected in any way by the character of the property in which its capital stock is invested. The power of the State over the corporate franchise and the conditions upon which it shall be exercised is as ample and plenary in the one case as in the other."

And, after citing and commenting upon the previous cases from Connecticut and Massachusetts, the court said: "In this case we hold as well upon general principles as upon the authority of the first two cases cited from 6 Wallace, that the tax for which the suit is brought is not a tax upon the capital stock or property of the company, but upon its corporate franchise, and is not therefore subject to the objection stated by counsel, because a portion of its capital stock is invested in securities of the United States."

In *United States* v. *Perkins*, 163 U. S. 625, the question was whether personal property bequeathed by will to the United States was subject to an inheritance tax under the law of the State of New York.

The facts of the case were that one William W. Merriam, a resident of the State of New York, left a last will and testament, by which he devised and bequeathed all his estate, real and personal, to the United States. The surrogate assessed an

inheritance tax of $3964.23 upon the personal property included in said bequest. Upon appeal to the general term of the Supreme Court the order of the Surrogate's Court was affirmed, and upon a further appeal to the Court of Appeals the judgment of the Supreme Court was affirmed, and the cause was brought to this court.

It was contended that, upon principle, property of the United States was not subject to state taxation; but it was held by this court, affirming the judgment of the courts below, that the tax was not open to the objection that it was an attempt to tax the property of the United States, since the tax was imposed upon the legacy before it reached the hands of the legatee; that the legacy became the property of the United States after it had suffered a diminution to the amount of the tax, and that it was only upon such a condition that the legislature assented to a bequest of it.

The reasoning of the court may be manifested by the following excerpts from the opinion delivered by Mr. Justice Brown:

"Though the general consent of the most enlightened nations has from the earliest historical period recognized a natural right in children to inherit the property of their parents, we know of no legal principle to prevent the legislature from taking away or limiting the right of testamentary disposition, or imposing such conditions upon its exercise as it may deem conducive to public good. In this view the so-called inheritance tax of the State of New York is in reality a limitation upon the power of a testator to bequeath his property to whom he pleases; a declaration that, in the exercise of that power, he shall contribute a certain percentage to the public use; in other words, that the right to dispose of his property by will shall remain, but subject to a condition that the State has a right to impose. Certainly, if it be true that the right of testamentary disposition is purely statutory, the State has a right to require a contribution to the public treasury before the bequest shall take effect. Thus the tax is not upon the property, in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution to the State that it becomes the property of the legatee. This was the view taken of a similar

tax by the Court of Appeals of Maryland in *State* v. *Dalrymple*, 70 Maryland, 294, in which the court observed:

"'Possessing, then, the plenary power indicated, it necessarily follows that the State in allowing property to be disposed of by will, and in designating who shall take such property where there is no will, may prescribe such conditions, not in conflict with or forbidden by the organic law, as the legislature may deem expedient. These conditions, subject to the limitations named, are, consequently, wholly within the discretion of the general assembly. The act we are now considering plainly intended to require that a person taking the benefit of a civil right secured to him under our law should pay a certain premium for its enjoyment. In other words, one of the conditions upon which strangers and collateral kindred may acquire a decedent's property, which is subject to the dominion of our laws, is, that there shall be paid out of such property a tax of two and a half per cent into the treasury of the State. This, therefore, is not a tax upon the property itself, but is merely the price exacted by the State for the privilege accorded in permitting property so situated to be transferred by will or by descent or distribution.'

"That the tax is not a tax upon the property itself, but upon its transmission by will or by descent, is also held both in New York and in several other States, *Matter of the Estate of Swift*, 137 N. Y. 77, in which it is said that the 'effect of this special tax is to take from the property a portion, or percentage of it, for the use of the State, and I think it quite immaterial whether the tax can be precisely classified with a taxation of property or not. It is not a tax on persons.' *Matter of Hoffman*, 143 N. Y. 237; *Schoolfeld's Executor* v. *Lynchburg*, 78 Virginia, 366; *Strode* v. *Commonwealth*, 52 Penn. St. 181; *In re Cullum*, 145 N. Y. 593. In this last case, as well as in *Wallace* v. *Myers*, 38 Fed. Rep. 184, it was held that, although the property of the decedent included United States bonds, the tax might be assessed upon the basis of their value, because the tax was not imposed upon the bonds themselves, but upon the estate of the decedent, or the privilege of acquiring property by inheritance.

Eyre v. *Jacob*, 14 Grattan, 422; Dos Passos on Inheritance Tax Law, chap. 2, and cases cited.

"Such a tax was also held by this court to be free from any constitutional objection in *Mager* v. *Grima*, 8 How. 490, Mr. Chief Justice Taney remarking that 'the law in question is nothing more than the exercise of the power which every State and sovereignty possesses, of regulating the manner and terms under which property, real and personal, within its dominion may be transferred by last will or testament, or by inheritance, and of prescribing who shall and who shall not be capable of taking it. . . . If a State may deny the privilege altogether, it follows that when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy.' To the same effect is *United States* v. *Fox*, 94 U. S. 315.

"We think it follows from this that the act in question is not open to the objection that it is an attempt to tax the property of the United States, since the tax is imposed upon the legacy before it reaches the hands of the government. The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the legislature assents to a bequest of it."

One of the propositions recognized in that case applicable to the present one is that a state tax that would be invalid if imposed directly on a legacy to the United States, may be valid if the amount of the tax is taken out of the legacy before it reaches the hands of the government—the theory of such a view apparently being that the property rights of the government do not attach until after the tax has been paid, or until the condition imposed by the tax law of the State has been complied with. Such is also the case in respect to the legacy to Ella Plummer Brown, as the statute in question distinctly makes it the duty of the executor to pay the amount of the tax before the legacy passes to the legatee.

In *New York* v. *Roberts*, 171 U. S. 658, an effort was made to have a tax imposed against corporations based upon "capital employed within the State" declared invalid, in that partic-

ular case, because a portion of such capital consisted of imported goods in original packages; and this court said:

"Again it is said that, assuming that the importation of crude drugs and their sale in the original packages constituted a portion of the corporate business, no tax could be imposed by the State under the doctrine of *Brown* v. *Maryland*, 12 Wheat. 419. But that case is inapplicable. Here no tax is sought to be imposed directly on imported articles or on their sale. This is a tax imposed on the business of a corporation, consisting in the storage and distribution of various kinds of goods, some products of their own manufacture and some imported articles. From the very nature of the tax, being laid as a tax upon the franchise of doing business as a corporation, it cannot be affected in any way by the character of the property in which its capital stock is invested."

In *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, the validity of the inheritance tax law of Illinois was assailed because of inequalities and discriminations so great as to amount to a deprivation of property and to a denial of the equal protection of the laws. The law in question had been upheld by the Supreme Court of the State in the case of *Kochersperger* v. *Drake*, 167 Illinois, 122, hereinbefore referred to.

This court held that the law was one within the competency of the legislature of the State to make, and that it did not conflict in anywise with the provisions of the Constitution of the United States. In the course of the discussion, Mr. Justice McKenna, who delivered the opinion of the court, said:

"The constitutionality of inheritance taxes has been declared and the principles upon which they are based explained in *United States* v. *Perkins*, 163 U. S. 325; *Strode* v. *Commonwealth*, 52 Penn. St. 181; *In re Merriam*, 141 N. Y. 479; *Minot* v. *Winthrop*, 162 Mass. 113; and in *Scholey* v. *Rew*, 23 Wall. 331.

"It is not necessary to review these cases, or state at length the reasoning by which they are supported. They are based on two principles: 1. An inheritance tax is not one on property, but one on the succession. 2. The right to take property by devise or descent is the creature of the law, and not a natural

right or privilege, and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the States may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions; and are not precluded from this power by the provisions of the respective state constitutions requiring uniformity and equality of taxation."

In closing our review of the Federal decisions the case of *Wallace* v. *Myers*, 38 Fed. Rep. 184, may be properly referred to, especially as it has been cited with approval by this court in *United States* v. *Perkins*, 163 U. S. 625, 629.

The question involved was the very one we are now considering, namely, the validity of the inheritance tax law of the State of New York when applied to a legacy consisting of United States bonds. In his opinion Circuit Judge Wallace reviewed many of the state and Federal decisions heretofore referred to, and reached the conclusion that the tax was to be regarded as imposed, not on the bonds, but upon the privilege of acquiring property by will or inheritance, and that where the property of the decedent included United States bonds, the tax may be assessed upon the basis of their value.

We think the conclusion, fairly to be drawn from the state and Federal cases, is, that the right to take property by will or descent is derived from and regulated by municipal law; that, in assessing a tax upon such right or privilege, the State may lawfully measure or fix the amount of the tax by referring to the value of the property passing; and that the incidental fact that such property is composed, in whole or in part, of Federal securities, does not invalidate the tax or the law under which it is imposed.

Passing from the authorities, let us briefly consider some of the arguments advanced in the able and interesting brief filed in behalf of the plaintiff in error.

The propositions chiefly relied on are, first, that an inheritance tax, if assessed upon a legacy or interest composed of United States bonds, is within the very letter of the United States statute which declares that such bonds "shall be exempt from taxation in *any form* by or under state, municipal or local

authority;" and, second, that the tax in question is unconstitutional, because impairing and burdening the borrowing power of the United States.

But if the first proposition is sound and decisive of the question in this case, then it must follow that the cases in which this court has held that, in assessing a tax upon corporate franchises, the amount of such a tax may be based upon the entire property or capital possessed by the corporation even when composed in whole or in part of United States bonds, must be overruled. Plainly in those cases, as in this, there was taxation *in a form*, and in them as in this the amount of the tax was reached by including in the assessment United States bonds.

So that we return to the authorities, by which it has been established that a tax upon a corporate franchise, or upon the privilege of taking under the statutes of wills and of descents, is a tax not upon United States bonds if they happen to compose a part of the capital of a corporation or a part of the property of a decedent, but upon rights and privileges created and regulated by the State.

The second proposition relied on, namely, that to permit taxation of the character we are considering would operate as a burden upon the borrowing power of the United States, cannot be so readily disposed of. Still, we think, some observations can be made which will show that the mischief, which it is claimed will follow if such statutes be sustained as valid, is by no means so great or important as supposed.

And here, again, it is obvious that to affirm the second proposition will require an overruling of our previous cases. For, on principle, if a tax on inheritances, composed in whole or in part of Federal securities, would, by deterring individuals from investing therein, and, by thus lessening the demand for such securities, be regarded as therefore unlawful, it must likewise follow that, for the same reasons, a tax upon corporate franchises measured by the value of the corporation's property, composed in whole or in part of United States bonds, would also be unlawful.

To escape from this conclusion, it is contended, in the argument of the plaintiff in error, that, conceding that such taxes

may be valid as imposed on corporate franchises, and permitting our decisions in such cases to stand, yet that the case of the estates of decedents is different; that individual persons will be driven to consider, when making their investments, whether they can rely on their legatees or heirs receiving United States bonds unimpaired by state action in the form of taxation; and that if it should be held by this court that such taxation is lawful, capital would not be invested in United States bonds on terms as favorable as if we were to hold otherwise.

This is only to state the proposition over again. For, if it were our duty to hold that taxation of inheritances, in the cases where United States bonds pass, is unlawful because it might injuriously affect the demand for such securities, it would equally be our duty to condemn all state laws which would deter those who form corporations from investing any portion of the corporate property in United States bonds.

In fact, the mischief, if it exists at all and is not merely fanciful, might be supposed to be much greater in the case of state laws taxing franchises than the case of taxing the estates of decedents. So small now is the income derivable from Federal securities that few individuals, and those only of great wealth, can afford to invest in them; and the demand for them is mostly confined to banking associations and to large trading and manufacturing companies which invest their surplus in securities that can be readily and quickly converted into cash. Moreover, no inconsiderable portion of the United States loans is taken and held, as every one knows, in foreign countries, where doubtless it is subjected to municipal taxation.

While we cannot take judicial notice of the comparative portions of the government securities held by individuals, by corporations and by foreigners, we still may be permitted to perceive that the mischief to our national credit, so feelingly deplored in the briefs, caused by state taxation upon estates of decedents, would be inappreciable, and too remote and uncertain to justify us now in condemning the tax system of the State of New York.

It is further contended that there is a vital difference between the individual and the corporation; that the individual exists

and carries on his operations under natural power and of common right, while the corporation is an artificial being, created by the State and dependent upon the State for the continuance of its existence, and subject to regulations and to the imposition of burdens upon it by the State, not at all applicable to natural persons.

Without undertaking to go beyond what has already been decided by this court in *Mager* v. *Grima*, 8 How. 490, in *Scholey* v. *Rew*, 23 Wall. 331, and in *United States* v. *Perkins*, 163 U. S. 625, and in the other cases heretofore cited, we may regard it as established that the relation of the individual citizen and resident to the State is such that his right, as the owner of property, to direct its descent by will, or by permitting its descent to be regulated by the statute, and his right, as legatee, devisee or heir, to receive the property of his testator or ancestor, are rights derived from and regulated by the State, and we are unable to perceive any sound distinction that can be drawn between the power of the State in imposing taxes upon franchises of corporations, composed of individual persons, and in imposing taxes upon the right or privilege of individuals to avail themselves of the right to grant and to receive property under the statutes regulating the descent of the property of decedents. And, at all events, the mischief apprehended, of impairing the borrowing power of the government by state taxation, is the same whether that taxation be imposed upon corporate franchises or upon the privilege created and regulated by the statutes of inheritance.

Again, it is urged that the pecuniary amount of the state tax which is to be set aside is of no legal consequence; that any amount, however inconsiderable, is an interference with the constitutional rights of the United States, and must therefore be annulled by the judgment of this court. Of course, nobody would attempt to affirm that an unconstitutional tax could be sustained by claiming that, in a particular case, the tax was insignificant in amount.

But when the effort is made, as is the case here, to establish the unconstitutional character of a particular tax by claiming

that its remote effect will be to impair the borrowing power of the government, courts in overturning statutes, long established and within the ordinary sphere of state legislation, ought to have something more substantial to act upon than mere conjecture. The injury ought to be obvious and appreciable. It may be opportune to mention that, even while we have been considering this case, the United States government has negotiated a public loan of large amount at a lower rate of interest than ever before known. From this it may be permissible to infer that the existence of legislation, whether state or Federal, including Federal securities as part of the mass of private property subject to inheritance taxes, has not practically injured or impaired the borrowing power of the government.

The contention of the plaintiff in error that taxation of the estates of decedents, in any form, and however slight, is invalid, if United States bonds are included in the appraisement, seems to be unreasonable. Suppose a decedent's estate consisted wholly of United States securities, could it reasonably be claimed that the charges and expenses of administration, imposed under the laws of the State, would not be payable out of the funds of the estate? If the estate were a small one, such expenses might require the application of all the Federal securities. If the estate were a large one, the expenses attendant upon administration would be proportionately large, to be raised out of the Federal securities. It is not sufficient to say that such expenses are in the nature of statutory debts, and that the question of the exemption of United States bonds cannot arise until after the debts of the estate shall have been paid. For, after all, what is an inheritance tax but a debt exacted by the State for protection afforded during the lifetime of the decedent? It is often impracticable to secure from living persons their fair share of contribution to maintain the administration of the State, and such laws seem intended to enable to secure payment from the estate of the citizen when his final account is settled with the State. Nor can it be readily supposed that such obligations can be evaded or defeated by the particular form in which the property of the decedent was invested.

Statement of the Case.

Upon the whole, we think that the decision of the courts below was correct, and the judgment is therefore

Affirmed.

Mr. Justice White dissented.

Mr. Justice Peckham took no part in the decision.